No. 90-5635-CFX
Status: GRANTED

Title: John J. McCarthy, Petitioner
v.
George Bronson, Warden, et al.

Docketed:
August 21, 1990

Court: United States Court of Appeals
for the Second Circuit

Counsel for petitioner: McCarthy,John J., Klein,Joel I.

Counsel for respondent: Strom,Steven

Entry	Date	Note	Proceedings and Orders
1	Aug 21 1990	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
3	Oct 1 1990		Waiver of right of respondents Bronson, et al. to respond filed.
4	Oct 4 1990		DISTRIBUTED. October 26, 1990
5	Oct 15 1990	X	Reply brief of petitioner McCarthy filed.
6	Oct 16 1990	X	Supplemental brief of petitioner John McCarthy filed.
7	Oct 18 1990	P	Response requested -- BRW. (Due November 17, 1990)
8	Nov 16 1990		Brief of respondents Bronson, et al. in opposition filed.
9	Nov 21 1990		REDISTRIBUTED. December 4, 1990
10	Nov 26 1990	X	Reply brief of petitioner John McCarthy filed.
12	Dec 10 1990		Petition GRANTED. limited to the following question: "Whether 28 U.S.C. Section 636(b)(1)(B), which authorizes a district court to refer, without the parties consent, to a magistrate for recommended findings a prisoner petition that challenges 'conditions of confinement' applies to cases challenging a specific episode of allegedly unconstitutional conduct rather than continuing prison conditions." **********
13	Dec 26 1990		Record filed.
		*	USCA 2-one vol.
14	Jan 16 1991		Joint appendix filed.
16	Jan 31 1991		Brief of petitioner John McCarthy filed.
15	Feb 1 1991		SET FOR ARGUMENT MONDAY, MARCH 25, 1991. (1ST CASE)
17	Feb 21 1991		CIRCULATED.
18	Feb 25 1991	X	Brief of respondents Bronson, et al. filed.
19	Mar 15 1991	X	Reply brief of petitioner John McCarthy filed.
20	Mar 25 1991		ARGUED.

90-5635

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

AUGUST TERM, 1990

JOHN J. MCCARTHY #38051-066
State No; 14163
UNITED STATES PENITENTIARY
P.O. BOX 1000
LEAVENWORTH KANSAS.,66048-1000

[PETITIONER]

-V-

GEORGE BRONSON, ET AL.
DEPARTMENT OF CORRECTIONS
340 CAPITOL AVE
HARTFORD, CONNECTICUT.,06106

[RESPONDENT]

PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

JOHN J. MCCARTHY PRO SE
P.O. BOX 1000
LEAVENWORTH KANSAS,66048

QUESTIONS PRESENTED FOR REVIEW

1. Is a prisoners law suit "trial" pursuant to 42 U.S.C. 1983 a "petition challenging conditions of confinment" and within the meaning of 28 U.S.C. 636 (b) (1) (B).

2. Is 28 U.S.C. 636 (b) (1) and (c) (2) vague and indefenite because it fails to describe precisely what specifically is a petition challenging conditions of confinment. Or because it fails to specifically outline what constitutes pursuade or induce as outlined in 636 (c) (2) and if administration of the consent procedure itself constitutes action pursuant to the above.

3. Is the petitioner entitled to have the claim of the Magistrate violating the "Blind Consent" provisions of 636 (c) (2) mentioned and decided by the Court of Appeals when he raised the issue significantly in his appeal briefs.

4. Was the petitioner entitled to a Jury Trial or Trial before the District Court Judge.

5. Was the Magistrate without jurisdiction because of the procedural posture of the case.

6. Did the petitioners second amended complaint raise new issues significantly for the purpose of Federal Rules of Civil Procedure Rule 38.

7. Did the petitioner waive his right to a Jury Trial in 1985.

8. Was the petitioner entitled to free transcripts, when objecting to the Magistrates findings and conclusions as being clearly erroneous.

IN THE SUPREME COURT
OF THE UNITED STATES
AUGUST TERM: 1990
No;_____

JOHN J. MCCARTHY #38051-066
STATE NO: 14163
[PETITIONER]

V.

GEORGE BRONSON, ET AL.
[RESPONDENT]

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Petitioner John J. McCarthy #38051-066 (state no; 14163) respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered and dated/ June 22, 1990

OPINION BELOW

The Court of Appeals entered the Opinion Affirming the District Courts action/Judgment in a suit brought under 42 U.S.C. 1983 (1982) alleging unlawfull removal of the plaintiff/petitioner from his prison cell and use of excessive force.

A copy of the decision is attached as Appendix A.

JURISDICTION

The Jurisdiction of this Court is invoked under Title 28 United States Code Section 1254 (1).1/

Note; 1/ No other petitioner is involved in this petition.

CONSTITUTIONAL PROVISIONS

SEVENTH AMENDMENT

EIGHTH AMENDMENT

FOURTEENTH AMENDMENT

STATEMENT OF THE CASE

This is a pro se appeal by a state prisoner John J. McCarthy from a June 19/1990 judgment of the district court (Jose A. Cabranes, Judge) in favor of the defendant's state prison officials. McCarthy sued under 42 U.S.C. 1983 (1982) alleging unlawfull removal from his cell and use of excessive force. The judgement was entered after a hearing conducted by Magistrate F. Owen Eagan. The case was complicated by some uncertanity as to the authority of the Magistrate in recomending proposed findings to the District Judge and the authority of the District Judge in approving those recomended findings. The appeal challenged procedural irregularities concerning the reference to the Magistrate, the lack of a Jury trial,the denial of free copy of hearing transcript, and the merits of the fact finding.(see; Appendix A at page4560)

One significant issue the Court of Appeals failed to address was the petitioner/appellants claim that the Magistrate violated the blind consent provisions of 28 U.S.C. 636 (c) (2) and Federal Rules of Civil Procedure Rules 53 (b) and 73 (b) as well as Local Rules 4 (A) (2) when he administered application of the consent form on two occausions. (see; Appendix A at pages; 4562,4563,) This issue was raised in the appellants initial Brief designated as Statement of Issue III. (see; Appendix B. at page ii at III.) It was again raised in the appelants reply brief.(see; Appendix C. at page 1. at 1.)

The Court of appeals failed to make comment or address the issue and the appellant petitioned for a rehearing.

REASONS FOR GRANTING THE WRIT

a. It appears that 28 U.S.C. 636 (b) (1) (A) (B) is vague and indefenite and there is controversy in the Circuits regarding its application. The Court of appeals framed the petitioners lawsuit as being a "petition challenging the conditions of confinment" within the meaning of of section 636 (b) (1) (B) but appearently there is no legislative history significantly substantiating this. (see; Appendix A. at page 4565, 4566, citing split in the Circuits)

This substiantial question should be settled by this Court.

b. 28 U.S.C. 636 (c) (2) explains the mechanism for application of the consent procedures. The petitioner raised in his appeal briefs that the Magistrate violated the "blind consent provisions" therefor was entitled to a new trial. The Court of appeals failed to comment. In light of the above the petitioner claims that;

1. He is entitled to have his claim addressed and that for the appellate court to egnore this violates due process.

2. That the Magistrate violated the Bind Consent provisions of 636 (c) (2) and in so doing;

a. Tainted his ability to be impartial and exposed the petitioners trial to prejudice fact finding.

b. Denied the petitioner due process.

c. Violated federal law and statute therefor was without Jurisdiction pursuant to 636 et seq.

c. The petitioner was entitled to a Jury Trial or a Trial before the District Court Judge because;

a. The Magistrates violated 636 (c) (2) therefor

the petitioner could not be held to the 1985 waiver when he consented to trial with the Magistrate in open Court. (see; Appendix A. at page; 4569)

b. The petitioners second amended complaint raised new issues significant for the purpose of Federal Rules of Civil Procedure Rule 38.

c. The petitioner never waived his right to a Jury Trial in consenting in 1985 to trial with the Magistrate in that the Magistrate never asked the petitioner if he in fact desired to seek a Jury Trial nor did he inform him that he could not revive a request for a jury trial subsequent to the consent.1/

d. Up untill March 24/1988 when trial commenced the Magistrate was acting under Jurisdiction of 636 (b) (1) et seq.,and that when the petitioner refused to sign the second consent prevented the Magistrate to continue Jurisdiction because 636 (b) (1) et seq ., does not express trial as being part of the duties contained therein. (see; Appendix A. at page; 4563). Therefor should have had a trial before the Judicial Officer District Court Judge. 2/

d. The petitioner was entitled to free transcripts because he claimed that the Magistrates findings were clearly erroneous and therefor should have been allowed to present his claim meaningfully. Becasue of this denial the Court of appeals later rejected the petitioners claim on appeal that the Correctional Officers planted a knief in his cell as a pretext to remove him claiming that the challenge is without substance. Obviously no substance is acquired when denied material i.e. transcript so to substantiate it. (see; Appendix A at page; 4570 at [5] Fact-Finding.)

Note; 1/ At the 1985 hearing the petitioner was represented by counsel soon after counsel withdrew and the petitioner proceeded pro se. The reason his counsel withdrew was because the petitioner filed a grievance against him. One of the issues raised in the grievance was his counsel failing to pursue the case meaningfully and failing also to raise issues i.e. Jury Demand.

2/ The appellate Court does concede it was a trial.

C O N C L U S I O N

For the forgoing reasons the petitioner John J. McCarthy #38051-066 (state no; 14163) respectfully requests that a writ of certiorari issue to review the Judgment of the Appeals Court affirming the District Court action.

Dated; August, 2 1990

RESPECTFULLY SUBMITTED

John J. McCarthy #38051-066
State No; 14163
UNITED STATES PENITENTIARY
P.O. BOX 1000
LEAVENWORTH KANSAS., 66048-1000

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

RESPONSE REQUESTED

ORIGINAL

No. 90-5635

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1990

JOHN J. MCCARTHY,

Petitioner,

v.

GEORGE BRONSON, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Steven R. Strom*
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*Counsel of Record

Counsel for Respondents

QUESTIONS PRESENTED

1. Does a signed written consent to a bench trial before a United States Magistrate, constitute a stipulation to trial by the court sitting without a jury pursuant to Rule 39(a)(1) and 28 U.S.C. 636(c)?

2. May a state prisoner at the commencement of the bench trial before the Magistrate unilaterally withdraw his consent, thereby depriving the Magistrate of jurisdiction to conduct the trial?

3. Is a prisoner's complaint under 42 U.S.C. § 1983 against prison officials a prisoner petition challenging conditions of confinement within the meaning of 28 U.S.C. § 636(b)(1)(B) so as to authorize the Magistrate to conduct evidentiary hearings on the merits of the case and file a report entitled "Recommended Findings of Fact and Memorandum of Decision."?

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TABLE OF AUTHORITIES

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

No. 90-5635

JOHN J. MCCARTHY,

Petitioner,

v.

GEORGE BRONSON, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF
IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

The respondents, George Bronson, Steven Tozier, Paul Lusa, and Fred Mickiewicz, all present or former state prison officials and employees of the Connecticut Department of Correction, pursuant to Supreme Court Rule 15.1, submit this brief in opposition to the writ of certiorari, calling to the Court's attention misstatements of fact or law which compel the denial of the petition in this case. The respondent prison officials respectfully request that this Court deny the petition for a writ of certiorari, seeking review of the opinion of the United States Court of Appeals for the

Second Circuit. That opinion is reported at 906 F.2d 835 (2d Cir. 1990).

The alleged conflict upon which the petitioner relies is illusory and this Court must "be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals." Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 79 (1955) citing from Layne & Bowler Corp. v. Western Well Works Inc., 261 U.S. 387, 393 (1916).

For the reasons discussed below, the petition for a writ of certiorari should be denied.

RESPONDENTS' COUNTER STATEMENT

This case involves far more than one specific episode of alleged unconstitutional conduct. McCarthy brought this action pursuant to 42 U.S.C. § 1983 challenging various aspects of his conditions of confinement while incarcerated at the Connecticut Correctional Institution at Somers, (CCIS). He named as one of the defendants George Bronson, who was warden of CCIS at the time of the events alleged. McCarthy alleged that the warden was responsible for the establishment of ongoing prison practices and regulations with regard to his placement in segregation, (Second Amended Complaint, ¶¶ 53, 55) including his classification and assignment to the "death cell", (see Findings of Fact ¶¶. 2, 61-63, Appendix 5, p. A13, A23) as well his exposure to unsafe living

conditions in the segregation unit, unnecessary exposure to violence prone inmates and cruel and unusual punishment by prison authorities. (Second Amended Complaint, ¶ 22) (Appendix 9)

McCarthy further alleged that there was an ongoing pattern or practice of use of chemical agents by correction officers against inmates solely to punish inmates and to inflict unnecessary pain and suffering. He claimed that the prison's written policies and procedures for the use of force against inmates, including the use of chemical agents, were deficient and that this deficiency was a substantial factor which authorized the use of the tear gas duster against him on July 13, 1982. (Second Amended Complaint, ¶¶ 17, 27, 28, 30, 31, 42) Lengthy testimony and documentary evidence was offered at trial regarding these alleged conditions of confinement. See e.g. Findings of Fact ¶¶ 56, 57, Appendix 5, p. A22.

On April 11, 1983, McCarthy filed his original pro se complaint. After reviewing the complaint, Judge Cabranes, the district court judge to whom the case had been assigned, referred the case sua sponte to Magistrate Eagan pursuant to 28 U.S.C. §§ 636(b)(1) (A) & (B). On February 28, 1985, the parties consented to have the case tried by the Magistrate in a bench trial to be held at CCIS. On March 5, 1985, Judge Cabranes entered an Order of Reference which directed Magistrate Eagan to conduct all further proceedings including the entry of judgment in accordance with Title 28 U.S.C. § 636(c) and the consent of the parties.

On March 24, 1988, the first day of trial, the Magistrate, apparently having forgotten that the parties had signed the consent

to a bench trial more than three years earlier, again offered the consent form to the parties for signature.[1] McCarthy refused to sign a second consent form. The Magistrate informed McCarthy that by refusing to sign he could not change the identity of the judicial officer who would hear the case. The only difference was that the Magistrate would be the recommended fact finder and not the final fact finder. Tr. 3/24/88 at 3-6. (Appendix 10)

On May 29, 1989, Magistrate Eagan issued his "Recommended Findings of Fact and Memorandum of Decision" which was endorsed by Judge Cabranes on June 19, 1989. See copy attached, Appendix 5. The findings of fact set forth in the Magistrate's recommended ruling are wholly incorporated by reference herein. Various post-judgment motions were filed by both parties. Judge Cabranes thereafter conducted a thorough de novo review of the transcripts and on August 17, 1989, he issued a Ruling on Pending Motions. Copy attached, Appendix 8.

On appeal, the United States Court of Appeals for the Second Circuit affirmed. McCarthy v. Bronson, 906 F.2d 835 (2d Cir. 1990). The Second Circuit held that the Magistrate was not required to take a narrow view of his authority and "[w]ith complete propriety he could have declined to vacate the 636(c) consent and adjudicated the merits definitively." Id. 906 F.2d at

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1 The respondents claim this inadvertant lapse was procedural, Archie v. Christian, 808 F.2d 1132, 1134-35 (5th Cir. 1987). Further, any other course by the magistrate would permit a prisoner to engage in "magistrate shopping" or "judge shopping". See Ruling on Pending Motions, August 17, 1989; Appendix 8 at p. A40; Fellman v. Fireman's Fund Insurance Co., 735 F.2d 55, 57-58 (2d Cir. 1984).

839. "The parties February 28, 1985 consent to have the matter tried by the Magistrate was entirely valid." Id. at 838.

In addition to money damages, McCarthy was seeking declaratory and injunctive relief to correct what he perceived to be unconstitutional prison policies and practices. (Second Amended Complaint, Sec. V. at pp. 8-9) Accordingly, he named the warden as a defendant, in his official capacity only, so he would be able to implement any injunctive relief the court might have ordered had he prevailed on the merits. Under the facts and circumstances of this case, the Second Circuit's decision below was entirely correct, and the petition should be denied.

ARGUMENT

I. MCCARTHY'S ACTION EASILY FALLS INTO THE CATEGORY OF PRISONER PETITIONS CHALLENGING CONDITIONS OF CONFINEMENT

In Hill v. Jenkins, 603 F.2d 1256, 1260 (7th Cir. 1979),[2] Judge Swygert, in his concurring opinion, described conditions of confinement as "ongoing prison practices and regulations with regard to matters such as placement in maximum security, deadlocks, unhealthy living conditions, unnecessary exposure to violence-prone inmates, overcrowded physical environments, and cruel and unusual punishment by prison authorities." McCarthy's action challenged his classification to administrative segregation and his assignment

2 To the extent Hill v. Jenkins relies on United States v. Raddatz, 592 F.2d 976 (7th Cir. 1979), it is in error. Hill v. Jenkins was decided prior to United States v. Raddatz, 447 U.S. 667 (1980), which requires the district judge to conduct "a de novo determination," Id. at 674, which was not done in Hill, and upheld the constitutionality of the Magistrates Act.

to the "death cell". His refusal to follow orders to pack his personal property and change cells was based on his perception that he would be unnecessarily exposed to violence-prone inmates. His challenge to the use of the tear gas duster was not based only on a single specific incident, but also was based on the alleged failure to have adequate policies and procedures so as to prevent the wanton use of chemical agents by correction officers who McCarthy alleged were inflicting cruel and unusual punishment. McCarthy further challenged the procedure for searching his cell after he had been removed from the area and claimed that the shank (prison-made knife) which was found in his property was planted. He challenged the disciplinary reports he received and the fact that these reports resulted in lengthier confinement in administrative segregation. He also challenged the adequacy of medical treatment he received. (Second Amended Complaint, ¶¶ 36-39)[3] Under the standard set forth by Judge Swygert in Hill v. Jenkins, supra, McCarthy's action can easily be classified a "prisoner petition challenging the conditions of confinement". Without question, McCarthy's action challenged the ongoing policies and procedures of CCIS. Accordingly, the reference to the Magistrate was authorized by section 636(b)(1)(B).

Hill v. Jenkins, supra, is not to the contrary. In that case a prisoner alleged that he lost some personal property as a result of a prison shakedown. Such an allegation fails to even state a

3 The majority in Clark v. Poulton recognizes that an allegation of denial of medical treatment does challenge conditions of confinement. Majority slip. op. at 20, n.8.

cause of action under § 1983. See, Hudson v. Palmer, 468 U.S. 517 (1984).[4]

In Orpiano v. Johnson, 687 F.2d 44 (4th Cir. 1982), a section 1983 claim that the inmate plaintiff was misled into believing charges would be dropped, challenged the administrative procedures under which the charges were brought and was held to be a prisoner petition challenging conditions of confinement. The inmate in Orpiano, like McCarthy, spent time in isolation and had a reduced chance for a transfer. The Fourth Circuit held that such a prisoner complaint was properly referred without consent pursuant to section 636(b)(1)(B). Id. at 46.

There is no need for this Court to reach the question raised by the petitioner in this case.

> A federal question raised by a petitioner may be "of substance" in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But the Court does not sit to satisfy a scholarly interest in such issues. Nor does it set for the benefit of particular litigants.

Rice v. Sioux City Memorial Park Cemetery, supra, 349 U.S. at 74. The Court has a duty to avoid decision of constitutional issues. Id. See also, Gomez v. United States, 109 S.Ct. 2237, 2241 (1989) (citing cases)

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4 In Hill v. Jenkins, there was no consent of the parties, no local rule permitting a magistrate to preside over a civil trial and no de novo review. Id. 603 F.2d at 1258. Similarly in Clark v. Poulton, the District of Utah had no local rule permitting reference to a magistrate for a civil trial. Clark (majority) slip. op. at 13 n.6.

Because a reasonable interpretation of McCarthy's § 1983 complaint is that it is a prisoner petition challenging conditions of confinement, the Court should avoid reaching the merits of petitioner's academic question, i.e. is a single incident a "condition of confinement", and should deny the petition.

II. THE INTERCIRCUIT CONFLICT NOTED BY PETITIONER IS ILLUSORY

The petitioner not only mischaracterizes his action as alleging only a "specific episode of unconstitutional conduct" but also misrepresents what he perceives as an irreconcilable intercircuit conflict. On closer examination, the only decision which is at odds with the decision below is Clark v. Poulton, et al, No. 88-1177, 1990 U.S. App. LEXIS 16625 (10th Cir. Sept. 21, 1990). The Clark decision is easily distinguishable from the McCarthy decision below.

The prisoner in Clark had never consented to proceed before a United States Magistrate and "neither the district court nor the magistrate [ ] purported to act pursuant to that provision [636(c)]." Clark, majority slip. op. at 12. Further, in Clark, the Tenth Circuit noted that the Local Rules for the District of Utah contain "no provision for the reference of civil trials to a magistrate." In McCarthy's case, the Local Rules for the District of Connecticut coincide with the same broad expansion of the Magistrate's authority envisioned by P.L. 94-577. See Legislative History, attached hereto, Appendix 11, 1976 U.S. Code Cong. &

Admin. News 6162, 6173.[5] In at least two places, the House report refers to "prisoner petitions brought under section 1983 of title 42 U.S. Code." Id. at 6166, 6171. A distinction between the actions exists based on McCarthy's challenge to a number of ongoing prison practices, as opposed to Clark's challenge to two isolated events, one of which occurred before Clark was even admitted to the jail. Clark majority slip. op. at 8.

The Clark majority's reliance on Houghton v. Osborne, 834 F.2d 745, 749 (9th Cir. 1987); Hall v. Sharpe, 812 F.2d 644, 647 n.1 (11th Cir. 1987); Wimmer v. Cook, 774 F.2d 68, 74 n.9 (4th Cir. 1985); and Orpiano v. Johnson, 687 F.2d 44, 47 (4th Cir. 1982) is misplaced. Clark, majority slip. op. at 8. None of these decisions is embarrassingly at odds with the Second Circuit's decision below. The petitioner's claim that the Fourth, Ninth, Tenth and Eleventh Circuits are in conflict with the Second Circuit's decision below is based on a misreading of those cases and is thoughtfully discussed in Judge Anderson's dissenting opinion in Clark. See dissent slip. op. at 1, n.1, 2, n.2.[6] The

---

5 The petitioner asserts that there is no need to resort to the legislative history because the plain meaning of "condition" is clear. Respondents refute this assertion and contend that "condition" can have a wide variety of definitions, many of which involve a single, specific event such as set forth in 8 Words and Phrases. (attached hereto, Appendix 12) A "condition" is "a future and uncertain event..." Black's Law Dictionary, 265 (5th ed. 1979), (Appendix 13)

6 Judge Anderson is entirely correct when he states that the majority opinion in Clark leads to absurd results. Slip. op. (dissent) at 2-3. Magistrate Eagan tried the class action overcrowding case at the Hartford Correctional Center over a

Footnote continued on next page.

Fourth Circuit is not at odds with the decision below. In Wimmer v. Cook, 774 F.2d 70,74 (4th Cir. 1985), the inmate plaintiff conceded the judge was empowered to refer the case to the magistrate without consent. The problem there involved conducting a jury trial without consent. Hall v. Sharpe, 812 F.2d 644, 647 n.1 (11th Cir. 1987) involved a single incident, and was reversed not because of an improper referral under § 636(b)(1)(B), but because there was no consent to a jury trial.

The Eighth Circuit in Thompson v. Nix, 897 F.2d 356, 357 (8th Cir. 1990), held that 28 U.S.C. § 636(b)(1)(B) authorized reference to a magistrate to hear a prisoner's allegation he was assaulted on two occasions. (Magistrate's report vacated for plain error and lack of de novo review).

McCarthy's case and the Second Circuit's decision below is not in conflict with decisions from other Circuit courts of Appeals and fits squarely within the clear meaning of 28 U.S.C. § 636(b)(1)(B).

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be denied.

Footnote continued from previous page.

period of 18 days. Lareau v. Manson, 651 F.2d 96, 98 (2d Cir. 1981); it is absurd to claim he could not hear an individual inmate's case.

Respectfully submitted,

RESPONDENTS

George Bronson, et al

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CERTIFICATION

I hereby certify that I am a member of the bar of this Court and a copy of the foregoing brief in opposition and attached appendix was mailed this 15th day of November, 1990 to:

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No. 90-5635

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1990

JOHN J. MCCARTHY,

Petitioner,

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Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

APPENDIX TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX TABLE OF CONTENTS

FILED

MAR 1' 11 59 AM '95

CLERK

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JOHN J. MC CARTHY

VS.

WARDEN, CARL ROBINSON

CIVIL NO. H-83-278 (JAC)

CONSENT TO PROCEED BEFORE A UNITED STATES MAGISTRATE

In accordance with the provisions of Title 28, U.S.C. §636(c), the parties to the above-captioned civil matter hereby voluntarily waive their rights to proceed before a judge of the United States District Court and consent to have a United States Magistrate conduct any and all further proceedings in the case, including trial, and order the entry of a final judgment.

John M°Carthy — 2/28/85
John J. McCarthy, Pro Se — Date

Patricia M. Strong — 2/28/85
Patricia M. Strong, Defendant's Counsel — Date

Date

[Do not execute this portion of the Consent Form if the parties desire that the appeal lie directly to the court of appeals.]

In accordance with the provisions of Title 28, U.S.C. §636(c)(4), the parties elect to take any appeal in this case to a district court judge.

John M°Carthy — 2/28/85
John J. McCarthy, Pro Se — Date

Patricia M. Strong — 2/28/85
Patricia M. Strong, Defendant's Counsel — Date

Date

19

ORDER OF REFERENCE

IT IS HEREBY ORDERED that the above-captioned matter be referred to United States Magistrate F. Owen Eagan for all further proceedings and the entry of judgment in accordance with Title 28, U.S.C. §636(c) and the foregoing consent of the parties.

José A. Cabranes, U.S.D.J.

3/5/85

FILED
MAR 5 4 16 PM '85
CLERK
U.S. DISTRICT COURT
HARTFORD, CONN.

for me to even have a weapon or to get a hold of one.

THE COURT: You are talking to a judge who has sat here for twelve years, and has listened to cases coming out of segregation for twelve years, and I think it was Justice Hopes that said judges are deemed to know the knowledge of the man on the street, and the man in the street knows that weapons are often found in this prison in the most secured places.

MR. McCARTHY: But those weapons --

THE COURT: Are you asking me to ignore something that I know is commonly found?

MR. McCARTHY: Sometimes it may be found, but they are usually made from something inside of that cell.

THE COURT: That could be right, I don't know. Just with twelve years worth of experience, I know that weapons make their way into that institution, and into all parts of this institution; even those secured areas.

MR. McCARTHY: I have to disagree, your Honor, because I can't recall weapons ever being found in punitive segregation. I have to disagree. At least not when I was there. I never

heard of no inmate being caught with weapons in punitive egregation.

THE COURT: I believe I tried at least six cases that involved --

MR. McCARTHY: Maybe the weapons were planted there.

THE COURT: I don't know that.

MR. McCARTHY: All right. That is what I am saying. We can't go by because you did face a few cases in here where weapons were alleged to have been found.

THE COURT: I have seen the weapons.

MR. McCARTHY: All right. But we don't know really -- what I'm saying, is I don't feel --

THE COURT: Where are you trying to go? I'm not trying to argue with you.

MR. McCARTHY: All I am trying to do is show to the Court that I was in a secured cell, and at the time I had good conduct, and there was no weapon in my cell. These officers fabricated -- either they fabricated their report saying they found a weapon or either they planted a weapon.

Also, I wanted to request Mr. Strom to produce this photograph that Officer Mickiewicz

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

LOCAL RULES FOR UNITED STATES MAGISTRATES

TABLE OF RULES

Rule 1

GENERAL JURISDICTION AND DUTIES OF MAGISTRATES

The following general jurisdiction and duties shall be exercised by each Magistrate appointed by the Court:

(A) The Magistrate shall have jurisdiction over the entire District, with such official station as is fixed by the order of appointment.

(B) The Magistrate shall perform all duties authorized by 28 U.S.C. Section 636 (a), including, but not limited to, the exercise of all powers and duties previously conferred or imposed upon United States Commissioners, and may also conduct extradition proceedings, and exercise misdemeanor trial and sentencing jurisdiction under 18 U.S.C. Section 3401.

(C) The Magistrate shall have authority to assist the Judges of this Court in the conduct of civil and criminal proceedings in all respects contemplated by 28 U.S.C. Section 636(b)-(c), including, but not limited to, exercise of the following duties:

(1) The review and any necessary hearing of, and issuance of recommended decision on, any motion for injunctive relief, to suppress evidence, to permit or to refuse class action maintenance, to dismiss or for summary judgment, or any other similar application in civil or criminal cases potentially dispositive of a claim or defense;

(2) The review, any necessary hearing, and determination of non-dispositive motions, including, but not limited to, those relating to discovery and other matters of procedure;

(3) The review and any necessary hearing of, and issuance of recommended decision on, any prisoner petitions challenging conditions of confinement and any applications for post-conviction relief, such review process to the extent pertinent to include also the issuance of preliminary orders and the conduct of incidental proceedings;

(4) The conduct of pretrial conferences; and

(5) Service as a special master in any appropriate proceedings on order of reference, and a special master reference may be made by consent of the parties without regard to the limiting provisions of Rule 53(b), Fed. R. Civ. P.; trial or other disposition of a civil case by the Magistrate on consent of the parties is further expressly authorized in accordance with 28 U.S.C. Section 636(c) and Rule 4, *infra*.

(D) The Magistrate shall have authority to perform such additional miscellaneous duties as are contemplated by the laws of the United

States, rules of procedure governing District Courts, and Local Court Rules and plans, and may also be assigned such other additional duties, not inconsistent with the Constitution and laws of the United States, as the Court may hereafter require.

Rule 2

REVIEW

(a) The Magistrate's written ruling, pre-trial conference order, or decision or report including proposed findings of fact and recommended conclusions of law, shall be filed with the Clerk, and the Clerk shall forthwith mail a copy to each party. Any party wishing to object must, within ten (10) days after service of such order or recommended ruling on him, serve on all parties, and file with the Clerk, written objection which shall specifically identify the ruling, order, proposed findings and conclusions, or part thereof to which objection is made and the factual and legal basis for such objection. For the purposes of this rule, service of the Magistrate's order or recommended ruling shall be deemed to occur no later than five (5) days after the filing of such order or ruling with the Clerk.

(b) In the event of such objection, in matters acted on by the Magistrate in an advisory capacity under Rule 1(C)(1) or (3), *supra*, the Judge ultimately responsible shall make a *de novo* determination of those portions of the proposed decision to which objection is made, and may accept, reject, or modify the recommended ruling in whole or in part. Such independent determination may be made on the basis of the record developed before the Magistrate, and need not ordinarily involve rehearing, although further evidence may also be received in the reviewing Judge's discretion. Absent such objection, the Judge ultimately responsible may forthwith endorse acceptance of the proposed decision; but the Judge, in his or her discretion, may afford the parties opportunity to object to any contemplated rejection or substantial modification of the proposed decision. In matters determined by the Magistrate under Rule 1(C)(2) or (4), *supra*, the reviewing Judge on timely objection shall set aside any order found to be clearly erroneous or contrary to law, and may, absent such objection, reconsider any matter *sua sponte*.

(c) Review of special master proceedings shall be in accordance with Rule 53, Fed. R. Civ. P., to the extent applicable. In civil cases referred to the Magistrate for trial by the parties' consent, appeals shall be taken as provided by Rule 4, *infra*, in accordance with 28 U.S.C. Section 636(c). Appeals in misdemeanor cases shall conform to the requirements of 18 U.S. C. Section 3402 and the Rules of Procedure for Trial of Misdemeanors before Magistrates.

Rule 3

ASSIGNMENT

All matters to be referred by the Judges to the Magistrates shall be referred in the first instance to the Clerk for appropriate assignment to be made under the supervison of the Chief Judge, bearing in mind such factors as a Magistrate's prior familiarity with proceedings, the seat of Court involved and current caseload allocation. With the assistance of the Magistrates' clerical staff, the Clerk shall be responsible for preparation and issuance of all calendars and notices of proceedings necessitated by such assignments.

Rule 4

CIVIL TRIAL JURISDICTION

(A)(1) Each Magistrate appointed by this Court is designated and authorized to exercise civil trial jurisdiction pursuant to 28 U.S.C. Section 636(c). The parties in any civil action may accordingly consent to trial before a Magistrate, subject to approval by the Judge assigned to the case. On such consent referral, the Magistrate is empowered to conduct all proceedings; *e.g.*, to determine all motions, to preside at trial, and to direct entry of judgment.

(2) When a civil action is commenced, the Clerk shall promptly notify the parties of their right to consent to referral of the case to a Magistrate for disposition; any such choice shall be made voluntarily, without inducement by the Court. The parties' agreement to such a reference is to be communicated in the first instance to the Clerk by written stipulation, which shall be forwarded to the assigned trial Judge for discretionary consideration. That stipulation must additionally state the parties' choice of appellate review method pursuant to 28 U.S.C. Section 636(c), by (1) direct appeal to the Court of Appeals, or (2) appeal in the first instance to the referring Judge, and thereafter, by petition only, to the Court of Appeals.

(B)(1) A direct appeal to the Court of Appeals shall be taken in the same manner as from any other judgment or reviewable order of this Court.

(2) The scope of an appeal to the referring Judge shall be the same as on an appeal from a judgment of this Court to the Court of Appeals; such appeal shall be taken as herein provided, subject on prompt application to such modification of time limits and procedures in a particular case as may be found appropriate by the Judge in the interest of justice. Dismissal of the appeal may be directed for failure to comply with this Rule 4 or related Court orders.

(3) Appeal to the referring Judge shall be taken by filing a notice of appeal with the Clerk within thirty (30) days after entry of the Magistrate's judgment, or within sixty (60) days after such judgment's entry if the United States or any officer or agency thereof is a party; if a timely notice of appeal is filed, any other party may file a notice of appeal within fourteen (14) days thereafter. The Clerk shall forthwith mail copies of a notice of appeal to all other parties. Any attendant stay application shall be made to the Magistrate in the first instance. The record on appeal shall consist of the original papers and

exhibits filed with the Clerk, the docket and any transcript of proceedings before the Magistrate. Within ten (10) days after filing the notice of appeal, the appellant shall make arrangements in the first instance for the production of any transcript deemed necessary. Within thirty (30) days after the notice of appeal is filed, the appellant's brief shall be served and filed; the appellee's brief shall be served and filed within thirty (30) days thereafter. Absent scheduling of oral argument on the Judge's own initiative, the appeal will be decided on the papers unless good cause for allowance of oral argument is shown by written request submitted with the brief.

(C) These provisions shall be construed to promote expeditious, inexpensive and just decision, and are subject to any controlling uniform procedures for such appeals as may be adopted hereafter by rule or statute.

Memo of Decision Filed

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JOHN J. MC CARTHY :

VS. : CIVIL NO. H-83-278 (JAC)

CARL ROBINSON, ET AL :

RECOMMENDED FINDINGS OF FACT AND MEMORANDUM OF DECISION

At all relevant times, the plaintiff was a prisoner at the Connecticut Correctional Institution at Somers (hereinafter CCIS). He brings this action pro se pursuant to 42 U.S.C. § 1983, alleging that the defendants violated his fourteenth amendment due process rights and his eighth amendment right to be free from cruel and unusual punishment when they used excessive force to remove him from his cell. Additionally, plaintiff claims that defendants committed an assault and battery against him in violation of state law. On December 22, 1986, this court determined that plaintiff's complaint and subsequent amendments set forth one issue for trial, that being: the constitutionality of defendants' use of a chemical weapon. See Ruling on Pending Motions at 3, 4 (filed December 22, 1986).

At the start of trial, the court noted that both Warden Robinson and Commissioner Manson are deceased. Accordingly, Warden Bronson and Commissioner Meachum were substituted in their official capacities for the deceased defendants. Additionally, plaintiff withdrew the complaint against Officers Falk, Bond, Flowers and

Texeira. Thus, the sole remaining defendants are Warden Bronson, Commissioner Meachum, Lt. Tozier, Officer Mickiewicz, Officer Lusa and Officer George. Plaintiff seeks declaratory and injunctive relief, compensatory damages in the amount of $220,000, punitive damages in the amount of $600,000 and costs.

FINDINGS OF FACT

In accordance with the provisions of 28 U.S.C. § 636(c), this matter was tried before this Magistrate over an eight day period starting March 24, 1988 and ending May 19, 1988. The following findings of fact were established by testimony elicited and exhibits submitted at trial:

1. The plaintiff is a convicted prisoner presently serving a ten to twenty year sentence for larceny in the first degree and burglary in the third degree. Additionally, plaintiff faces a six year consecutive sentence for six counts of burglary in the third degree and six counts of larceny.

2. On July 13, 1982, plaintiff was housed in cell F-36. Cell F-36 is the last cell at the end of death row. It is referred to as the "death cell" and is separated from other cells in segregation by a wall with a door.

3. In 1982, this area was used for isolation purposes where the most salient individuals were placed if they posed a threat or caused a disruption.

4. At approximately 9:00 A.M. on July 13, 1982, Lt. Tozier notified plaintiff that he would be moving to cell F-85 in administrative segregation.

5. On July 13, 1982, Lt. Tozier was director of the special offenders program which covered the segregation and protective custody units. The director of the special offenders program was responsible for all the activities in three special units. In that capacity, Lt. Tozier was considered to be a shift supervisor and had authority to order the use of a chemical weapon.

6. Prior to July 13, 1982, Lt. Tozier received training in the use of chemical munitions at the Correctional Training Academy and as part of his supervisory training and review. He has had fourteen years of on the job training, and used chemical agents numerous times in his career.

7. Shortly after lunch, an inmate tierman for F Block named Mike Ceretta, instructed plaintiff to pack his belongings in preparation for his cell transfer. Approximately, twenty minutes later, Correctional Officer Mickiewicz visited plaintiff and asked if he was packed-up.

8. Plaintiff believed originally that Officer Mickiewicz relayed a direct order through inmate Ceretta to pack-up and prepare for his cell change. Later, when speaking directly with Officer Mickiewicz, plaintiff did not construe the instructions to pack-up as a direct order because Officer Mickiewicz did not specify that it was a direct order per se.

9. Plaintiff refused to pack his property. Instead, he indicated that he wanted to know why he was being moved and he requested to see a supervisor.

10. Officer Mickiewicz called Lt. Tozier and informed him that plaintiff refused to move. Lt. Tozier instructed Officer Mickiewicz to contact the hall keeper for help.

11. At approximately 2:30 P.M. on July 13, 1982, plaintiff heard other inmates state that the guards were forming a "group" and "rolling".

12. Plaintiff believed the guards were coming to get him. He panicked and tied his cell door closed with pieces of clothesline and jammed a piece of plastic from a plastic spoon into the keyslot.

13. Correctional Officers Mickiewicz, Lusa, George and Flowers entered F. Block at approximately 2:30 P.M. on July 13, 1982. Before entering the death row area, they formulated a game plan for extracting plaintiff from his cell. While discussing how to remove plaintiff, the officers were joined by Lt. Tozier.

14. When the Lieutenant arrived, a description was provided of plaintiff's cell area, including the fact that plaintiff's cell bars were tied shut and that plaintiff was in an angry, agitated state.

15. It was decided that Lt. Tozier would remain out of sight of the plaintiff so as to not aggravate the situation. The officers would ask plaintiff to voluntarily come out of his cell and issue

an order if necessary. If he refused, the correctional officers would enter the cell and remove the plaintiff.

16. While the correctional officers spoke with the plaintiff, Lt. Tozier remained in the proximity of F-36; positioned just outside the doorway to the annex area of F-36.

17. Plaintiff was standing in his cell holding the mattress from his bed. The officers cut the twine tied on the cell door.

18. Officer George asked plaintiff what the problem was and asked him to come out peacefully at least twice. The officers spent approximately ten to fifteen minutes trying to coax plaintiff out of his cell. Officer Mickiewicz then ordered plaintiff to come out.

19. Plaintiff refused to exit the cell and made threatening statements consisting of "You will have to come and get me," and "Someone is going to get hurt."

20. Officer Lusa approached plaintiff's cell door and placed a tear gas "duster" on the bars of the door.

21. Officer Lusa was the hall keeper of F Block on July 13, 1982. As the hall keeper, Officer Lusa's duties included responding to situations involving moving inmates, troublesome inmates, hang suicides, falls, and alarms.

22. When hall keepers responded to a call to remove an inmate from a cell, they would always bring a bag with necessary tools, inclusing tear gas and mace. Officer Lusa had substantial experience with the tear gas duster and had used it on numerous occasions prior

to July 13, 1982.

23. When plaintiff saw the duster, he used the mattress to shield himself and made no further response.

24. Plaintiff suddenly lunged toward a specific area of his cell. On the belief that plaintiff was lunging for a weapon, and at the verbal command of Lt. Tozier, Officer Lusa deployed the tear gas duster.

25. Officer Lusa sprayed the duster once for about three seconds while standing approximately six feet from the plaintiff. A fog-like dust enveloped plaintiff and he ceased to resist.

26. The piece of plastic was freed from the lock and Officers Mickiewicz, George and Lusa entered the gas-filled cell. Officer Mickiewicz handcuffed plaintiff. Physical force was not used as plaintiff did not resist at that point.

27. Officer Mickiewicz quickly escorted plaintiff to isolation cell F-43 followed by the other officers. The officers and plaintiff were in the gassed cell for approximately two to five minutes.

28. The door to cell F-36 was closed and locked so that tear gas dust would not disperse and to protect the plaintiff's property. Windows were opened and fans were in place.

29. At approximately 3:30 P.M., plaintiff arrived at the isolation area where his handcuffs were removed. He was stripped, searched, and then put into cell F-43. No rashes, burns or signs

of redness were observed on plaintiff's body.

30. When plaintiff arrived in cell F-43 he requested and demanded a shower. Because plaintiff was still in an agitated and violent state of mind, Lt. Tozier decided it would not be appropriate to take plaintiff out of F-43 immediately following the gassing incident. Plaintiff was informed that he would not get a shower until he calmed down.

31. Plaintiff was not in physical danger because there was hot and cold running water in plaintiff's cell. Lt. Tozier did not order that plaintiff's water be shut off. Considering the amount of gas used and the availability of water, there was no need to send a medic to see plaintiff at that time.

32. Approximately three hours after the incident, when Lt. Tozier was sure that plaintiff had calmed down sufficiently, he authorized the second shift supervisor to shower plaintiff.

33. Lingering gas fumes filtered into the F Block segregation unit annoying some of the inmates and inciting them to throw milk cartons and refuse from their cells. There was no large scale disturbance.

34. At approximately 4:00 P.M., Officer Dudek came on duty for the second shift in F Block. At that time, there was no smell of tear gas in the segregation unit.

35. Lt. Tozier left a verbal order for the second shift officers to search plaintiff's cell. At approximately 9:30 P.M., Officers

Dudek and Higgins went to search cell F-36.

36. When correctional officers pack and secure an inmate's belongings, they generally look for contraband as well. Two officers always enter an inmate's cell together when performing a search or "shakedown" so that one officer acts as a witness to the actions of the other officer.

37. When they arrived at the partitioned separating the death row cells from the segregation cells, they found the door locked and secured.

38. Officers Dudek and Higgins unlocked the door, entered the death row area and locked the door behind them. They packed-up plaintiff's property and exited from plaintiff's cell into the death chamber (where property is stored).

39. In the death chamber, they searched through plaintiff's property. Officer Higgins inspected a cereal box in which he found a shank, or homemade knife, stuck underneath a flap of the box. The shank was approximately ten inches long with a six inch blade. Officer Dudek took the shank, put it in his pocket, and turned it over to the shift supervisor.

40. Between 3:00 P.M. and 12:00 A.M., there was no opportunity for anyone to enter plaintiff's cell. The outer door to plaintiff's cell area was locked and all inmate tiermen were locked in their cells for a "count" at the time of the incident and at 4:00 P.M. when Officer Dudek came on duty.

41. On the evening of July 13, 1982, Nurse Rogal routinely toured the segregation unit. At approximately 9:30 that same night, plaintiff received a medical exam and was sent Caladryl ointment in response to his complaint of itchy skin.

42. On the following day, July 14, 1982, Nurse Sharon Snyder routinely toured the segregation unit. Plaintiff asked Nurse Snyder for some Tylenol. He did not complain of chemical burns or skin irritations.

43. On July 15, 1982, Dr. Carl Johnson and Nurse Sharon Snyder toured the segregation unit. Dr. Johnson examined plaintiff and noted plaintiff's complaint as a questionable chemical burn under his right arm, up his side, and in his hair. Dr. Johnson prescribed "kenalog" cream.

44. On July 16, 1982, during the course of Nurse Snyder's daily visit to segregation, plaintiff requested a decongestant.

45. On July 19, 1982, plaintiff requested more Tylenol from Nurse Snyder.

46. On July 22, 1982, during another "seg check" by Dr. Johnson, plaintiff complained of an underarm irritation. The doctor prescribed cream to be applied three times a day.

47. 47. On July 26, 1982, plaintiff's prescription for decongestion was refilled.

48. Plaintiff was not taken to the hospital for treatment after

the gassing incident. To the extent that plaintiff's injuries were treated with ointments and Tylenol, they were insignificant in nature.

49. In 1982, only two chemical weapons were utilized at CCIS; mace and the 271 tear gas duster. At that time, the word "duster" had a specific meaning and was used to refer to the 271 tear gas duster. The 271 duster was designed for interior use and specifically for use in correctional facilities.

50. The active chemical agent in mace and the 271 tear gas duster is choloracetophenone, or "CN". CN is a lacrimating agent which induces profuse watering of the eyes. The canister containing the CN arrived at CCIS premixed by the manufacturer. The mixture consists of "anti-caking agent" and 64% CN. There was no way to influence the chemical mixture inside the canister.

51. The proper deployment method of the 271 duster is to aim waist high at the individual. When a barrier is used as a shield, the 271 duster should be aimed at the barrier.

52. In order for mace to be effective, it must make contact with the skin. When an inmate uses a blanket or bedding materials as a barricade, mace is considered ineffective and its use could place the officers at a risk.

53. Generally, the 271 duster was used as a preventive measure. When properly used, the 271 duster was not considered any more or less dangerous than mace or any other device in law enforcement.

54. The effect of the tear gas dust is to cause the eyes to burn and sting. The feeling is uncomfortable and unpleasant, but the sensation is short-term and does not cause lasting damage.

55. The tear gas dust is removed by shaking it from exposed clothing and applying water to the skin. Because the dust is very superficial, water removal is the recognized first aid treatment for chemical agent exposure.

56. On July 13, 1982, there were administrative directives in effect authorizing the use of force and the use of chemical weapons against inmates.

57. When deciding whether to authorize the use of a chemical weapon, a supervising officer considers a number of factors, including: (i) the potentially assaultive and aggressive nature of the inmate, (ii) whether the inmate is in a cell refusing to come out, and (iii) whether the inmate is threatening the officers with physical harm.

58. Additionally, there are three or four reasons for using a chemical weapon on an inmate. One reason is to aid in the movement of an inmate from an area that they control to an area controlled by the officers.

59. In light of the kind of bars on plaintiff's cell, the placement of foreign objects in the keyway, and the clothesline tied on the cell door, plaintiff was in control of the area of his cell.

60. Because plaintiff could not be evacuated in the event of a fire or emergency, it would not have been proper or appropriate for defendants to walk away from the situation.

61. On June 2, 1982, plaintiff wrote to Assistant Warden Bronson and Commissioner Manson complaining of harrassment by Lt. Tozier and requesting reconsideration of his segregation status.

62. Assistant Warden Bronson responded stating that he found Lt. Tozier's actions were appropriate and consistent with procedure. Additionally, he informed plaintiff that the Special Offenders Program classification committee would recommend his return to general population if he remained misconduct free for a period of thirty days.

63. Commissioner Manson informed plaintiff that his placement in segregation was appropriate due to plaintiff's ongoing and consistent disciplinary record. The Commissioner indicated that plaintiff was in the least desirable of cells because he destroyed state property. Additionally, Commissioner Manson noted that plaintiff's record in segregation had been "horrendous." When plaintiff demonstrated an ability to abide by prison rules, he would be released into population. In the interim, plaintiff was instructed that he should not "put [his] feelings on Lt. Tozier or any other person, staff or inmate."

64. Lt. Tozier was unaware of plaintiff's letters to the Assistant Warden and the Commissioner. He received no reprimand with respect to plaintiff's allegations. In fourteen years of

service, Lt. Tozier was never reprimanded in relation to his duties.

65. On July 13, 1982, Lt. Tozier made a discretionary decision to use force based on the need to maintain order, discipline, and the security of F Block and the institution. The decision was made only after Lt. Tozier arrived on the scene. Lt. Tozier's decision was based on his evaluation of the situation and his knowledge of the inmate.

66. As director of the Special Offenders Program, Lt. Tozier reviewed plaintiff's misconduct record for special offender classification meetings. From a period of 1/6/82 to 7/13/82, plaintiff received approximately fifteen misconduct reports involving charges of tampering with locking devices, destroying state property, possession of drugs and intoxicating substances and possession of a weapon.

67. Lt. Tozier's decision to use a chemical agent was not made in order to punish plaintiff, cause unnecessary pain, or in retaliation for the letters plaintiff sent.

68. The primary reason for the chain of events that occurred on July 13, 1982 was plaintiff's refusal to obey lawful orders issued by the defendants. When an inmate is ordered to change cells he must follow the order then make his appeal to the supervisor. Plaintiff failed to comply with a lawful order and made threatening statements.

69. Under the circumstances, use of the 271 tear gas duster

was in the best interests of those involved. The 271 duster was safer and more humane than physical force which might have resulted in injury to the officers as well as the plaintiff. The barricade raised by plaintiff necessitated using the 271 duster rather than mace. Under the circumstances, there were not less forceful means to remove plaintiff from his cell.

70. The use of the 271 duster was appropriate and proper. An excessive amount of gas was not expelled. The use of force was reasonably related to the need to remove plaintiff from his cell and restore order and discipline to the block.

DISCUSSION

As stated above, the plaintiff claims that defendants used excessive force to remove him from his cell and caused serious injuries as a result. Plaintiff asserts that defendnats' actions subjected him to cruel and unusual punishment in violation of the eighth amendment and deprived him of substantial liberties without due process of law in violation of the fourteenth amendment.

I. Eighth Amendment Claim

The Second Circuit has set forth the following factors as useful in determining whether alleged excessive force amounts to a constitutional violation.

> In determining whether the constitutional line has been crossed, a court must look to such factors as the need for the application of force, the relationship between the need and the amount of force

> that was used, the extent of the injury inflicted, and whether force was applied in a good faith effort to maintain or resotre discipline or maliciously and sadistically for the very purpose of causing harm.

Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir.), cert. denied, 414 U.S. 1033 (1973).

When proving an eighth amendment violation, the plaintiff has an extremely difficult burden. "'After incarceration, only the 'unnecessary and wanton infliction of pain'...constitutes cruel and unusual punishment forbidden by the Eighth Amendment.'" Whitley v. Albers, 475 U.S. 312, 319 (1986)(quoting Ingraham v. Wright, 430 U.S. 651, 670 (1977)). "[C]onduct that does not purport to be punishment at all must involve more than ordinary lack of due care for the prisoner's interests or safety." Id. Thus, the infliction of pain as a security measure is not a constitutional violation simply because it may later appear unreasonable. Id. The test turns on "whether force [was] applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." Glick, 481 F.2d at 1033.

Examination of the record in this case does not reveal credible evidence to support plaintiff's claims. The record indicates that plaintiff was notified at least twice that he would be changing cells sometime during the day of July 13, 1982. Plaintiff was asked repeatedly to move voluntarily and then was ordered to come out of

cell. Regardless of his justifications for refusing to move, plaintiff had no constitutionally protected right to disobey a lawful order from a prison official. Nor did plaintiff have a constitutional right to know why he was being moved. Finally, plaintiff had no constitutional right to remain incarcerated in a particular cell. See Olim v. Wakinekona, 461 U.S. 238 (1983); Burr v. Duckworth, 547 F. Supp. 192, 197 (N.D. Ind. 1982), aff'd mem., 746 F.2d 1482 (7th Cir. 1984).

Plaintiff contends that defendants used the 271 duster solely as a disciplinary tool because he "stray[ed] from the letter of the prison code." Clearly, this was not a situation where force was used to punish plaintiff for violating the Code of Penal Discipline. Plaintiff's actions in barricading himself in his cell and jamming the cell lock created a threat to the safety of the institution as well as to himself. In the event of an emergency or a fire, plaintiff could not have been evacuated quickly and safely. Additionally, plaintiff made threatening comments to the officers and had a history of misconduct suggesting a potentially assaultive or aggressive nature. In light of these circumstances, this court cannot find that use of the chemical weapon was unauthorized or unreasonable.

Plaintiff alleges that the amount of chemical agent used was excessive and resulted in severe burns and open, raw, sores. However, the record indicates that Officer Lusa sprayed the tear gas

for approximately two to three seconds. Less than one hour later, when Officer Dudek reported for duty, there was no smell of tear gas outside the segregation unit. Further, none of the officers who participated in the incident required medical treatment or showers after being exposed to the same amount of gas. Moreover, plaintiff's medical records indicate that plaintiff experienced only "itchy skin" a few hours after the incident and minor skin irritation lasting approximately one week. The skin rashes were treated with creams and ointments and did not require transferring plaintiff to an outside facility or the hospital unit. On at least three occasions during the two weeks following the incident, plaintiff did not even mention discomfort from the gassing and requested only Tylenol and decongestants from the medical staff.

Lastly, plaintiff argues that Lt. Tozier's decision to use the 271 tear gas duster was malicious, retaliatory, and made in bad faith. There is no evidence in the record to support such a claim. Of the fifteen misconduct reports received by palintiff prior to the incident, only one had been issued by Lt. Tozier. Furthermore, plaintiff himself testified that while other inmates and guards called him names and verbally abused him, Lt. Tozier never uttered derogatory remarks toward plaintiff. Finally, in response to plaintiff's complaints regarding Lt. Tozier, both Commissioner Manson, and Warden Bronson found the Lieutenant's behavior to be

appropriate and beyond reproach. Accordingly, plaintiff has failed to demonstrate that the use of force was applied maliciously or sadistically for the very purpose of causing harm.

II. Fourteenth Amendment Claim

Plaintiff further proposes liability alleging that he was deprived of a state created liberty interest without due process of law in violation of the fourteenth amendment. It would be difficult to comprehend conduct which would "shock the conscience" of this court and so violate the fourteenth amendment, yet not also be "'inconsistent with contemporary standards of decency' and 'repugnant to the conscience of mankind,' in violation of the Eighth." Whitley, 475 U.S. at 327 (quoting Estelle v. Gamble, 429 U.S. 97, 103, 106 (1976))(citation omitted).

Simply stated, in the prison security context, "the Due Process Clause affords [the plaintiff] no greater protection than does the Cruel and Unusual Punishment Clause." Whitley, 475 U.S. at 327. Plaintiff has failed to demonstrate that defendants' use of a chemical weapon was unreasonable or unathorized. Accordingly, the court concludes that the due process clause does not serve as an alternative basis for liability.

CONCLUSION

For the foregoing reasons, plaintiff has failed to establish that defendants' use of a chemical weapon violated his constitutional

rights under the eighth or the fourteenth amendments. Accordingly, judgment shall enter in favor of the defendants.

Any objections to this report and recommendation must be filed with the Clerk of Courts within fifteen (15) days of receipt of this notice. Failure to file objections within the specified time waives the right to appeal the District Court's order. 28 U.S.C. § 636.

Dated at Hartford, Connecticut, this 22nd day of May 1989.

F. Owen Eagan
United States Magistrate

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JOHN J. MC CARTHY :

VS. : CIVIL NO. H-83-278 (JAC)

CARL ROBINSON :

RULING ON MOTION FOR REAPPOINTMENT OF COUNSEL

When the petitioner commenced this action in April 1983, the court appointed counsel for him. However, on January 31, 1985, th court permitted appointed counsel to withdraw after the plaintiff filed a grievance against him. In October 1986, the plaintiff again asked the court to find and appoint counsel for him. On October 28, 1986, after careful consideration of the possible meri of the plaintiff's case and other relevant circumstances, the court denied the plaintiff's motion for appointment of another attorney. See Hodge v. Police Officers, 802 F.2d 58 (2d Cir. 1986 In denying counsel, the court noted, inter alia, that "the plaintiff's chances of ultimate success are meager" and that the court "is unable to find any attorney who is willing to take the plaintiff's case because of [his] reputation for abusing all past appointed counsel." Ruling on Motion for Appointment of Counsel, October 28, 1986, at 3-4.

On April 10, 1987, the plaintiff filed a "motion for reappoin ment of counsel." After the court denied the plaintiff's first motion for appointment of counsel, prison officials transferred th plaintiff from the Connecticut Correctional Institution in Somers to the United States Penitentiary in Terre Haute, Indiana. The plaintiff cites this transfer as a new reason supporting his request for appointment of counsel.

As already stated, the court has carefully examined the plaintiff's request for appointment of counsel; it will not reiterate facts and findings which remain unchanged as a result of the plaintiff's out of state transfer. The plaintiff's action has not become more meritorious simply because the plaintiff resides in a new state. Nor has the plaintiff, an experienced pro s litigator, suddenly become less able to pursue this action on this own. Finally, the court is still unable to find a capable attorne who is willing to represent this plaintiff.

The court has already met its obligation to the plaintiff by appointing experienced and competent counsel for him on one occasion. See U.S. ex rel. George v. Lane, 718 F.2d 226 (7th Cir. 1983). When an inmate is transferred from state custody to a federal institution located in another state, officials must provide an inmate with an adequate law library or adequate aid from

persons trained in the law applicable to the action. See Bounds v Smith, 430 U.S. 817 (1977); Brown v. Smith, 580 F. Supp. 1576, 157 78 (M.D. Pa. 1984). The instant action involves issues of federa law, not Connecticut law. The plaintiff sets forth no facts which indicate that the law library at Terre Haute is inadequate for any remaining research he may wish to do. As long as the Terre Haute law library has adequate resources for the plaintiff to conduct research concerning the use of mace in the prison setting, the plaintiff's right to access to adequate legal assistance has been protected.

The motion for reappointment of counsel is denied.

Dated at Hartford, Connecticut, this 2nd day of June 1987.

F. Owen Eagan
United States Magistrate

DEC 24 %

ATTORNEY GENERAL'S OFFICE
340 CAPITOL AVE. HTFD. DISTRICT OF CONNECTICUT

FILED

JOHN J. McCARTHY, Plaintiff

v.

CARL ROBINSON, Et al. Defendants

CIVIL No. H-86-[illegible]CR

RULING ON PENDING MOTIONS

The plaintiff, an inmate at the Connecticut Correctional Institution in Somers ("CCIS"), has brought this action pro se and in forma pauperis pursuant to 42 U.S.C. Sec. 1983. Included as defendants are the warden at CCIS, as well as several correctional officers. The plaintiff claims that the defendants violated his constitutional rights when they sprayed him with "Big Red," a chemical weapon similar to mace. Presently pending are: (1) Plaintiff's Motion for a Preliminary Injunction; (2) Plaintiff's Motion for Copies of all Pretrial Transcripts; and, (3) Defendants' Objection to the Plaintiff's Jury Demand in the Second Amended Complaint.

I. Plaintiff's Motion for a Preliminary Injunction

On October 7, 1986, the plaintiff filed a motion seeking an order enjoining prison officials from transferring him to another correctional facility. He claims that the defendants arranged this transfer so that his legal material would be lost in transit, thus impeding his access to the court. He further states that officials effectuated this transfer in retaliation for the numerous legal actions the plaintiff has filed against Department of Corrections employees. However, by October 6, 1986, the plaintiff already had been transferred to the United States Penitentiary in Terre Haute, Indiana. See Affidavit of Commissioner Lopes, Exhibit A.

Since the plaintiff seeks to block a transfer which has already occurred,

his request for injunctive relief is moot. See Lynch v. Coughlin, 784 F.2d 461 (2d Cir. 1986). Moreover, an inmate ordinarily has no constitutionally protected interest in remaining in one facility as opposed to another. Olim v. Wakinekona, 461 U.S. 238 (1983); Meachum v. Fano, 427 U.S. 215 (1976). In this particular case, the plaintiff's allegation that his transfer was effectuated for an improper reason does not change this conclusion. The plaintiff, while confined at CCIS, has received over forty misconduct reports since 1981. He has engaged extensively in conduct which has jeopardized institutional order and security. Prison officials have transferred the plaintiff to another institution in order to maintain order at CCIS, as well as to offer the plaintiff an opportunity to get a fresh start in a different general prison population. See Lopes Affidavit. Officials are afforded wide-ranging deference in executing practices designed to preserve internal order and security. Bell v. Wolfish, 441 U.S. 520 (1979). Since the decision to transfer the plaintiff is supported by a valid reason, the fact that it may have temporarily hindered the plaintiff's ability to file papers in this Court does not render the transfer unlawful. See Sher v. Coughlin, 739 F.2d 77 (2d Cir. 1984). The plaintiff's motion for an injunction is denied.

II. Plaintiff's Motion for a Copy of Pretrial Transcripts

The plaintiff has requested "from this Court a copy of all the pretrial transcripts, except for when Attorney Brian Smith was representing [him]." Plaintiff's Motion. Since the plaintiff has brought this action in forma pauperis, the Court assumes that he wants these copies free of charge. The plaintiff provides two reasons for this request: (1) He needs the transcripts to support his motion to enjoin his transfer; and, (2) He wants to view the pretrial proceedings so he can prepare a new civil rights action.

The transcripts which the plaintiff seeks would cover proceedings before Magistrate Eginton. Generally, the Magistrate does not record pretrial conferences or other pretrial proceedings held at Somers Prison. In short, the documents which the plaintiff seeks do not exist.

Moreover, even if these documents did exist, the plaintiff has not demonstrated a present entitlement to free copies of them. The Court is authorized to provide a transcript for a person who has been permitted to appeal in forma pauperis if the trial judge or circuit judge certifies that the appeal is not frivolous. 28 U.S.C. Sec. 753(f). There is no clear statutory authority which suggests that the plaintiff is entitled to any trial-related transcripts prior to an appeal from a judgment of the district court. See Toliver v. Community Action Commission, 613 F.Supp. 1070, 1072 (S.D.N.Y. 1985). The right to proceed in forma pauperis does not carry with it a right to obtain copies of court documents to search for possible errors or to use for prospective litigation. United States v. Houghton, 388 F.Supp. 772 (N.D. Tex. 1975).

The plaintiff's request for a copy of the pretrial transcripts is denied.

III. Defendants' Objection to Plaintiff's Jury Demand

In April, 1983, the plaintiff filed his original complaint. In that complaint, he alleged that the defendants' use of mace violated his constitutional rights. He did not request a jury trial. In April, 1985, he filed an amended complaint. This complaint added four parties and substituted one, but raised no new issues. The amended complaint contained no request for a jury trial. On July 8, 1985, the same defendants were served with a second amended complaint which included a jury demand. Although more detailed, this complaint contained no new issues.

A plaintiff must demand a jury trial on any issue no later than ten days

after the service of the last pleading directed to such issue. Fed. R. Civ. P. 38(b). Failure to make a timely demand constitutes a waiver of that right on all issues in the complaint. Fed. R. Civ. P. 38(d). A subsequent amendment of the original complaint does not revive the right to a jury trial unless the amendment changes the issues set forth in the original complaint. Lanza v. Drexel and Co., 479 F.2d 1277, 1310 (2d Cir. 1973). Likewise, the addition of a co-defendant does not automatically revive a previously waived jury trial right unless new issues are presented in the amendment. State Mutual Life Assurance Co. of America v. Arthur Andersen and Co., 581 F.2d 1045, 1049 (2d Cir. 1978).

The plaintiff did not claim his right to a jury trial until more than two years after filing his original complaint. Although his complaints have been progressively more detailed, and have added more defendants, all have consistently set forth the constitutionality of the use of mace as the issue to be resolved. Accordingly, the plaintiff is not entitled to a jury trial.

Conclusion

1. Plaintiff's motion for an injunction is DENIED.

2. Plaintiff's motion for pretrial transcripts is DENIED.

3. Defendants' objection to plaintiff's request for a jury trial is SUSTAINED.

SO ORDERED.

Dated at New Haven, Connecticut, this 22d day of December, 1986.

JOSE A. CABRANES
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

JOHN J. McCARTHY :

v. : CIVIL NO. H-83-278(JAC)

CARL ROBINSON, et al. :

RULING ON PENDING MOTIONS

This is a pro se action brought under 42 U.S.C. § 1983 by a plaintiff who at all relevant times was a prisoner at the Connecticut Correctional Institution at Somers ("Somers"). On April 11, 1983, the same date the complaint was filed, I referred this case to Magistrate F. Owen Eagan for all pretrial proceedings. On February 28, 1985 plaintiff, acting pro se, and defendant's counsel both signed a "Consent to Proceed Before a United States Magistrate" form consenting to trial before a United States Magistrate pursuant to 28 U.S.C. § 636(c), and on March 5, 1985 I approved this form. Trial before Magistrate Eagan began at Somers on March 24, 1988, at which point plaintiff refused to sign another "Consent to Proceed Before a United States Magistrate" form. After the close of trial and briefing by both sides, Magistrate Eagan on May 23, 1989 issued a document styled "Recommended Findings of Fact and Memorandum of Decision," and on June 19, 1989 I endorsed this document as follows:

> Absent a timely objection to the Magistrate's recommended ruling, see 28 U.S.C. § 636(b)(1) and Rule 2 of the Local Rules for U.S. Magistrates (D. Conn.), and for the reasons stated by the Magistrate, the Recommended Findings of Fact and Memorandum of Decision is hereby accepted and adopted as the decision of the court. Accordingly, judgment shall enter in favor of the defendants. It is so ordered.

The Clerk entered judgment in favor of the defendants on June 19, 1989. Both sides have now filed various motions.

Because my June 19 endorsement order contained a citation to an inappropriate subsection of the United States Code, and because it was not particularly clear in any event, I must at the outset discuss the procedural posture in which this case now appears. My March 5, 1985 order approving the "Consent to Proceed Before a United States Magistrate" form had the necessary effect of amending the referral to Magistrate Eagan to include the conducting of the trial of this case, pursuant to 28 U.S.C. § 636(c) and Rule 4 of the Local Rules for United States Magistrates (D. Conn.) ("Local Rules"). Because plaintiff refused to sign another "Consent to Proceed Before a United States Magistrate" form on the first day of trial, however, Magistrate Eagan chose not to direct the entry of judgment after trial, as he was authorized to do by 28 U.S.C. § 636(c)(1) and Rule 4(A)(1) of the Local Rules. Instead, Magistrate Eagan issued a document entitled "Recommended Findings of Fact and Memorandum of Decision," essentially acting as a special master pursuant to his powers under 28 U.S.C. § 636(b)(2) and Rule 1(C)(5) of the Local Rules. This prudent course of action by Magistrate Eagan was entirely

appropriate.[1] Absent a timely objection, see Fed. R. Civ. P. 53(e)(2) and Rule 2(c) of the Local Rules, I adopted the findings of fact recommended by Magistrate Eagan. These facts clearly compelled the entry of judgment in favor of defendants.

With this overview of the procedural posture of the case, I can now turn to the pending motions:

1. Plaintiffs' [sic] Motion for Relief From Judgement [sic] (filed June 29, 1989) -- Plaintiff moves, presumably under Fed. R. Civ. P. 60(b)(6), for relief from the judgment entered June 19, 1989, on the grounds that he did not receive Magistrate Eagan's Recommended Findings of Fact and Memorandum of Decision until June 7, 1989 and therefore the court did not give him sufficient time to file objections to that report prior to entering judgment. Plaintiff did file an objection to the Recommended Findings of Fact and Memorandum of Decision on June 22, 1989.

Assuming for the argument only that valid objections to the Recommended Findings of Fact and Memorandum of Decision would justify relief from the judgment under Fed. R. Civ. P. 60(b)(6), or would justify alteration of the judgment under

[1] I believe it also would have been perfectly proper for Magistrate Eagan to continue to act under 28 U.S.C. § 636(c) and Rule 4 of the Local Rules. Once a case is referred to a magistrate under § 636(c), a party cannot withdraw his consent and demand that the case return to the district judge. Fellman v. Fireman's Fund Insurance Company, 735 F.2d 55, 57-58 (2d Cir. 1984). Such a rule is necessary to avoid "magistrate shopping" by parties, withdrawing their consent if they are unhappy with the particular magistrate to whom the referral went.

Fed. R. Civ. P. 59(e), I still cannot grant this motion. I am required to accept the findings of fact recommended by Magistrate Eagan in this case, in which he essentially acted as a special master, unless they are "clearly erroneous." See Fed. R. Civ. P. 53(e)(2); Equal Employment Opportunity Commission v. Local 638, 700 F. Supp. 739, 743 n.1 (S.D.N.Y. 1988). I have thoroughly reviewed the objections raised by plaintiff in Plaintiffs [sic] Objection to the Magistrates' Recomended [sic] Findings and Memorandum of Decision Dated May 23/1989 (F. Owen Eagan) (filed June 22, 1989) and in Plaintiffs' [sic] Memorandum in Support of his Objection to the Magistrates' Recomended [sic] Findings of Facts and Memorandum of Decision Dated May 23/1989 Re: 28 U.S.C. 636(c) (filed June 22, 1989).[2] I cannot conclude that any of the factual findings challenged by plaintiff is "clearly erroneous." Even upon a de novo determination I would reach the same conclusions as the Magistrate regarding the matters to which there has been objection.

Accordingly, Plaintiffs [sic] Objection to the Magistrates' Recomended [sic] Findings and Memorandum of Decision Dated May 23/1989 (F. Owen Eagan) (filed June 22, 1989) is OVERRULED. Plaintiffs' [sic] Motion for Relief From Judgement [sic] (filed June 29, 1989) is therefore DENIED.

[2] Aiding me greatly in conducting this review was the thorough Defendants' Memorandum in Opposition to Objections to the Magistrate's Recommended Findings of Fact and Memorandum of Decision (filed July 12, 1989).

2. Plaint s' [sic] Motion for a St of Judgement [sic] Re: F.R.Civ.P. Rule 74 et seq (filed June 22, 1989), Notice of Appeal to Di: ict Court Judge (filed Ju 22, 1989), Plaintiffs' [sic] Motion for a Copy of Transcript and Production of Transcripts Pursuant to F. R. Civ. P. rule 75(b)(2) (filed June 22, 1989) -- Plaintiff "appeals" the "decision" of Magistrate Eagan to the district judge, and moves for transcripts for his "appeal" and a stay of the judgment pending the "appeal." As noted above, however, Magistrate Eagan did not issue a decision in this case under 28 U.S.C. § 636(c), so no "appeal" can be taken to the district judge. Therefore this "appeal" must be DISMISSED and the motions DENIED. The judgment in this case was entered upon my order, and any appeal from that judgment must be taken to the Court of Appeals.

3. Motion for Order (filed July 12, 1989) -- Defendants seek an order (under 28 U.S.C. § 636(c)(5)[3], 28 U.S.C. § 1915(a), and 28 U.S.C. § 753(f)) certifying that any appeal in this case is frivolous, not taken in good faith, and lacking in probable cause. This motion is DENIED. Because of the unique procedural posture of this case I cannot say that an appeal to the Court of Appeals would not be taken in good faith within the meaning of § 1915(a).

[3]The motion cites "28 U.S.C § 636(4)(5)," but since no such subsection exists I assume defendants mean § 636(c)(5).

4. Plaintiffs' [sic] Motion for the Court Reporter to Prepare the Transcripts of this Case for the Purpose of Appeal (filed August 15, 1989) -- Plaintiff moves for an order directing the court reporter to prepare the entire transcript of the trial proceedings and deliver one copy to the Court Clerk and one copy to the plaintiff. Presumably plaintiff is requesting that the United States pay the fees for preparing these transcripts, pursuant to 28 U.S.C. § 753(f). This motion must be DENIED, as I cannot certify that "the appeal is not frivolous (but presents a substantial question)" within the meaning of § 753(f).[4] In addition I note that the record of this case as it now stands is ample to present to the Court of Appeals any issues regarding the procedural posture of this case, the only issues from which an appeal could be taken in good faith within the meaning of 28 U.S.C. § 1915(a).

5. Plaintiff/Appellants [sic] Motion to Proceed on Appeal In Forma Pauperis (filed August 15, 1989) -- Plaintiff moves for an order, pursuant to Fed. R. App. P. 24(a), for leave to proceed on appeal in forma pauperis. Because plaintiff makes an adequate showing of poverty, that motion is GRANTED.

[4]Although I have denied defendants' motion to certify that an appeal would not be taken in good faith within the meaning of 28 U.S.C. § 1915(a), I am not willing to certify that an appeal presents a substantial question for review within the meaning of 28 U.S.C. § 753(f). I am not certifying anything at all regarding this appeal.

CONCLUSION

To summarize: Plaintiffs [sic] Objection to the Magistrates' Recomended [sic] Findings and Memorandum of Decision Dated May 23/1989 (F. Owen Eagan) (filed June 22, 1989) is OVERRULED. Plaintiffs' [sic] Motion for Relief From Judgement [sic] (filed June 29, 1989) is DENIED. The Notice of Appeal to District Court Judge (filed June 22, 1989) is DISMISSED. Plaintiffs'[sic] Motion for a Stay of Judgement [sic] Re: F.R.Civ.P. Rule 74 et seq (filed June 22, 1989) is DENIED. Plaintiffs' [sic] Motion for a Copy of Transcript and Production of Transcripts Pursuant to F. R. Civ. P. rule 75(b)(2) (filed June 22, 1989) is DENIED. The Motion for Order (filed July 12, 1989) is DENIED. Plaintiffs' [sic] Motion for the Court Reporter to Prepare the Transcripts of this Case for the Purpose of Appeal (filed August 15, 1989) is DENIED. Plaintiff/Appellants [sic] Motion to Proceed on Appeal In Forma Pauperis (filed August 15, 1989) is GRANTED.

It is so ordered.

Dated at New Haven, Connecticut, this 17th day of August 1989.

José A. Cabranes
United States District Judge

APPENDIX 9

AO 440 (Rev. 10/93) SUMMONS IN A CIVIL ACTION

United States District Court	DISTRICT CONNECTICUT
JOHN J. McCARTHY	DOCKET NO. H-83-276 (JAC)
v.	TO: (NAME AND ADDRESS OF DEFENDANT) Lieutenant Steve Tozier CCI-Somers Bilton Road Somers, Conn. 06071 In his Official capacity
CARL ROBINSON, Et Al.	

YOU ARE HEREBY SUMMONED and required to serve upon

PLAINTIFF'S ATTORNEY (NAME AND ADDRESS)

John J. McCarthy (pro se)
Post Office Box 100
Somers, Connecticut 06071

RECEIVED
JUL 15 1965
ATTORNEY GENERAL'S OFFICE
HTFD.

an answer to the complaint which is herewith served upon you, within twenty (20) days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

A True Copy
ATTEST
KEVIN F. ROWE
Clerk
By

CLERK	DATE
KEVIN F. ROWE	7/2/65
(BY) DEPUTY CLERK	

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

JOHN J. McCARTHY,
Plaintiff,
-v-
CARL ROBINSON, Warden (deceased), Connecticut Correctional Institution, Somers; GEORGE BRONSON, Warden, Connecticut Correctional Institution, Somers; JOHN MANSON, Commissioner (deceased) of Corrections; STEVE TOZIER, Luitenant, Connecticut Correctional Institution, Somers; and Correctional Officers MICKIEWICZ, LUSA, JORGE, TEXEIRA, FALK, FLOWERS and BOND; in their individual and official capacities,
Defendants.

C.A. No. H-83-276 (JAC)

SECOND AMENDED (CIVIL RIGHTS) COMPLAINT WITH A JURY DEMAND

This is a § 1983 action filed by John J. McCarthy, a state prisoner, on April 11, 1983 alleging violation of his constitutional rights and seeking money damages, declatory judgment, and injunctive relief. The plaintiff requests a trial by jury.

I. Jurisdiction

1. This is a civil rights action under 42 U.S.C. § 1983 to redress the deprivation, under color of state law, of rights secured by the Constitution of the United States. The court has jurisdiction under 28 U.S.C. § 1343. Plaintiff seeks declaratory relief pursuant to 28 U.S.C. §§ 2201 and 2202 as well as injunctive relief. Plaintiff also invokes the pendent jurisdiction of this Court.

II. Parties

a. Plaintiffs

2. Plaintiff John J. McCarthy is and was at all times mentioned herein a prisoner of the state of Connecticut in the custody of the Connecticut Department of Corrections confined at the Connecticut Correctional Institution at Somers, Connecticut (hereinafter called "CCI-Somers" for purposes of this Complaint).

b. Defendants

3. Defendant Carl Robinson was the Warden of CCI-Somers until his death on December 18, 1983. Defendant Carl Robinson was legally responsible for the daily operation of CCI-Somers prior to December 18, 1983 and, specifically, on July 13, 1982 and for the welfare of all the inmates then confined in that prison.

4. Defendant George Bronson is the present Warden of CCI-Somers. He replaced the above-named defendant shortly after that defendant's death (first as "Acting Warden" then as Warden) on December 18, 1983). Defendant Bronson is lagally responsible for the daily operation of CCI-Somers and for the welfare of all the inmates of that prison. On or about July 13, 1982, Defendant George Bronson served as the Assistant Warden of Operations at CCI-Somers.

5. Defendant John Manson was the Commissioner of the Department of Corrections of the State of Connecticut until his death on September 17, 1983. He was legally responsible for the overall operation of the Department on or about July 13, 1982 and for the operation of each institution under its jurisdiction including CCI-Somers.

6. Defendant Steve Tozier is a Correctional Lieutenant at CCI-Somers and, as regards this complaint, was the Supervisor of Cell Block F on July 13, 1982 and the supervisor of the below-next named defendants.

7. Defendants Mickiewicz, Lusa, Jorge, Texiera, Falk, Flowers and Bond are each Correctional Officers of the Department of Corrections, who, at all times mentioned in this complaint, were assigned to CCI-Somers.

8. Each defendant is sued individually and in his official capacity. At all times mentioned in this complaint each defendant acted under color of Connecticut law.

III. Facts

9. The original complaint in this case was filed on April 11, 1983.

10. On July 13, 1982 at approximatly 1:45 P.M., plaintiff was ordered by defendant Mickiewicz to move from his cell (F-36) located in the area of CCI-Somers known as F-Block to another cell located in F-Block (F-85).

11. Plaintiff requested that he be given an explanation of the reason for said move from a supervising officer.

12. No explanation of the reason for said move was provided to plaintiff.

13. Plaintiff refused to move.

14. Defendant Lieutenant Tozier, acting as supervisor of F-Block, authorized the use of force including the use of a chemical weapon to remove plaintiff from his cell (F-36).

15. Plaintiff was forceably removed from his cell by defendants Lusa, Jorge, Texeira, Falk, Flowers and Bond with the use of a chemical weapon.

16. The chemical weapon used to remove plaintiff from his cell was a Tear Gas Duster commonly referred to by correctional sadists as "Big Red."

17. At the time plaintiff was forceably removed from his cell, Administrative Directives of the Department (of Corrections) did not contain a written standard for the use of force.

18. On July 13, 1982 at approximately 2:30 P.M., defendant Tozier ordered defendant Lusa to "gas" the plaintiff.

19. During the course of the forceable removal of the plaintiff from his cell and the giving of the above-said order, defendant Tozier was not line-of-sight of the incident.

20. At the conclusion of 'gassing' the plaintiff, defendants Lusa, Jorge, Texeira, Falk, Flowers and Bond handcuffed the plaintiff and removed him from his cell to another isolation cell.

21. During the course of the afore-mentioned incident, the plaintiff did not resist defendants Lusa, Jorge, Texeira, Falk Flowers and/or Bond, nor did plaintiff threaten any of those defendants with bodily harm.

22. On information and belief, defendant Mickelwicz had conspired with other prisoners involved in racial riots in F-Block to move me from F-36 to F-85, where those riots were occurring, in order to involve me in those riots.

23. According to the F-Block Log Book, plaintiff was removed from his cell at 2:30 P.M. by defendants Lusa, Jorge, Texeira, Falk, Flowers, and Bond.

24. The Tear Gas Duster mentioned, supra, is a more powerful weapon than mace.

25. The Incident Report signed by defendant Tozier indicates by check-off that "force", "mace", and "restraints" were used in the afore-mentioned forceable removal of plaintiff from his cell.

26. Defendant Tozier stated to the Correctional Ombudsperson that he authorized the use of the Tear Gas Duster because: a) he did not have confidence that mace would be effective; and b) he wanted something faster and stronger.

27. There is no standard reporting form for any chemical weapon other than mace used at CCI-Somers.

28. On July 13, 1982 there was no standard reporting form for any chemical weapon other than mace used at CCI-Somers.

29. On information and belief obtained from Training Officer Fields and Standards Compliance Supervisor Mary Anne Connors of the Department (of Corrections):

a) The tear gas duster is considerably more powerful and faster acting than mace.

b) The duster is particularly effective for situations where there is a physical barrier between the inmate and the officers which would preclude the use of mace (which requires direct contact to be effective); the duster can also be sprayed at a distance and the gaseous cloud that results can "roll" forward and still have an incapacitative effect.

c) The tear gas duster is a more dangerous weapon than mace because of its greater potential to cause burning; to prevent or reduce burning, the area of exposure must be promptly flushed with water.

d) The duster is not supposed to be fired within four feet of the subject nor is it supposed to be aimed at the eyes or head (in contrast to the instructions for mace which specifically call for aiming the weapon between the chin and upper chest area of the subject at close range).

e) The particular model weapon used in this case had proved to be especially dangerous due to an excessively high concentration of the irritant chemical, for which reason the manufacturer had recommended discontinuing its use.

30. There were no written directives governing the use of chemical weapons other than mace at the time this incident occurred.

31. The Directives for use of mace state in relevant part: "It has an approximate range of 15 to 20 feet . . . Being a weapon, final decisions in the firing of this weapon must be made by the Shift Supervisor on duty at the institution at the time."

32. Written policy and procedure of the Department of Corrections and the Institution did not provide for the use of the tear gas duster.

33. Mace was the chemical weapon of choice for the Department of Corrections in a situation involving a single inmate.

34. There was no evidence that the plaintiff was immune to the effects of mace.

35. Plaintiff was confined in his cell, alone, and there were no visual obstructions or significant physical barriers.

36. Plaintiff was not afforded a shower until at least two and one-half hours after the incident.

37. A rinse was especially important in this incident because the weapon had been fired directly at the plaintiff.

38. Plaintiff did not recieve medical attention until approximately seven hours after the incident and no Medical Incident Report accompanied the Incident Reports of July 13, 1982. The medical records at the CCI-Somers Hospital indicate that Dr. Johnson saw the plaintiff on July 15, 1982. Dr. Johnson observed chemical burns on plaintiff's arm, under his arm, and in his scalp. Plaintiff was treated at that time with an ointment.

39. Post-incident treatment of the plaintiff was inadequate.

40. The gas duster was not properly deployed.

41. The reports of the incident are deficient in that:

a. A Use of Mace Report was filed and "mace" was checked off on the Incident Report, creating an inaccurate and misleading record. It was not evident from the record that tear gas had been used.

b. It is not evident from the Incident Report that defendant Tozier was not at the immediate site of the incident. It is not evident that he did not give the order to fire the weapon. The reports did not state where the supervis-

sor was at the time the gas was dispersed, who gave the order to discharge the weapon, at what range the weapon was discharged, and where it was aimed. Such information is critical in determining whether a chemical weapon was properly deployed.

c. A Medical Incident Report was not filed with the Incident Report. Such a report is required by Administrative Directive 2.3 on reporting of incidents involving use of force.

42. At the time of the incident, neither the Administrative Directives nor the CCI-Somers Operational Directives contained a use of force doctrine. Neither addressed the use of the tear gas duster or other chemical weapons, except mace.

43. Plaintiff suffered extensive injuries to his body, some of which are permanent, as a result of the use of the tear gas duster.

44. On July 14, 1982 at 8:15 A.M. Correctional Officer issued plaintiff a disciplinary report signed by defendant Mickiewicz charging plaintiff with "Disobeying a direct order" based on plaintiff's refusal to move from his cell.

45. After plaintiff was forceably removed from cell F-36, another inmate was placed in that cell along with plaintiff's personal effects.

46. Another prisoner was confined in cell F-36 along with plaintiff's personal property from approximately 3:00 P.M. until approximately 9:00 P.M. on July 13, 1982.

47. After another prisoner was removed from plaintiff's cell, Correctional Officers Higgins and Dudek purportedly searched plaintiff's cell and found a 10" long shank (home-fashioned knife).

48. The shank referred to above was found among the plaintiff's personal effects.

49. The shank referred to in paragraphs 47 and 48, supra, was not found in the vicinity of plaintiff's bed in cell F-36.

50. On July 13, 1982 at 10:45 P.M., plaintiff's cell (F-36) was searched and Correctional Officer Higgins reported finding the shank described in paragraph 47, supra, among plaintiff's personal property.

51. On July 13, 1982 at 11:30 P.M., plaintiff was issued a disciplinary report signed by Correctional Officer Higgins

charging plaintiff with possession of "Contraband" based on the afore-mentioned finding of a shank in cell F-36.

52. On July 16, 1982, a hearing was held concerning the disciplinary report described paragraph 44, supra, at which plaintiff plead not guilty to the charge of disobeying a direct order.

53. At the conclusion of the above-mentioned hearing, plaintiff was found guilty and punishments were imposed upon plaintiff including indefinite confinement to punitive segregation and recommended loss of sixty days good conduct time.

54. On July 16, 1982, a hearing was held concerning the disciplinary report described in paragraphs 47 and 48, supra, at which plaintiff plead not guilty to the charge of possession of contraband "class A".

55. At the conclusion of the above-mentioned hearing, plaintiff was found guilty and punishments were imposed upon plaintiff including idefinite confinement to punitive segregation and recommended loss of sixty days good conduct time.

56. On August 1, 1982, plaintiff was notified by defendant Manson that sixty days of good conduct time had been forfeited as a result of the disciplinary hearing mentioned in paragraphs 52 through 55, above.

57. (reserved for future amendments)

58. (reserved for future amendments)

59. (reserved for future amendments)

60. (reserved for future amendments)

IV. Legal Claims

a. First Cause of Action

61. The actions of the defendants stated in paragraphs 9 through 60 denied plaintiff due process of law in violation of the Fourteenth Amendment to the United States Constitution.

62. Plaintiff's Fourteenth Amendment right to be free of unjustified and excessive use of force was violated when
a) he was tear gassed and
b) forceably removed from his cell.

63. Plaintiff's Fourteenth Amendment right not to be deprived of his liberty interest was violated when he was deprived of his statutorily created good conduct time.

b. Second Cause of Action

64. The actions of the defendants stated in paragraphs 9 through 43 violated state law.

65. Plaintiff alleges that defendants violated state law of assault and battery and the regulations of the Connecticut Department of Corrections with respect to the lawful use of force when plaintiff was sprayed with tear gas while in his cell.

c. Third Cause of Action

66. The actions of the defendant stated in paragraphs 9 through 45 denied plaintiff of his right to freedom from cruel, unusual and corporeal punishments in violation of the Eighth Amendment to the United States Constitution and subjected the plaintiff to punishments imposed without due process of law in violation of the Fourteenth Amendment to the United States Constitution.

67. Plaintiff's Eighth and Fourteenth Amendment rights to be free from cruel and unusual punishments imposed without due process of law were violated when
a) he was tear gassed and
b) forceably removed from his cell.

V. Relief

WHEREFORE, plaintiff requests this Honorable Court grant the following relief:

A. Issue a declatory judgment that defendants violated the United States Constitution and state law when they:
1) used the tear gas duster on plaintiff without justification;
2) forceably removed plaintiff from cell F-36 and
3) deprived plaintiff of his statutorily-based lib-

erty (good time) interest.

B. Issue an injunction ordering that defendants or their agents:
1) refrain from using tear gas against plaintiff, except when immediately necessary to prevent injury, death, or the destruction of valuable property;
2) immediately formulate and adopt rigid Directives restricting the use of Tear Gas and the weapon known as the Tear Gas Duster to riot situations involving multiple inmates or to situations where there exist barriers obstructing the use of mace.
3) immediately formulate and adopt rigid Directives requiring the immediate post-incident treatment of inmates sprayed with tear gas including adequate medical treatment and shower facilities.

C. Grant compensatory damages in the following amount:
1) $100,000 against defendants Robinson and Bronson;
2) $100,000 against defendant Manson;
3) $10,000 against defendants Tozier and Lusa and from each of them;
4) $10,000 against defendant Mickiewicz; and
5) $5,000 against defendants Jorge, Texeira, Falk Flowers and Bond, and from each of them.

D. Grant punitive damages of $100,000 against each of the the defendants.

E. A jury trial on all issues triable by jury.

F. Plaintiff's costs of this suit including, but not limited to, attorney's fees (if any).

G. Such other and further relief as this court deems just, proper and equitable.

Dated: April 19, 1985 at Somers, Connecticut.

Respectfully submitted,

John J. McCarthy
Post Office Box 100
Somers, Conn. 06071

In Propria Personam

JHLI/rjd

V E R I F I C A T I O N

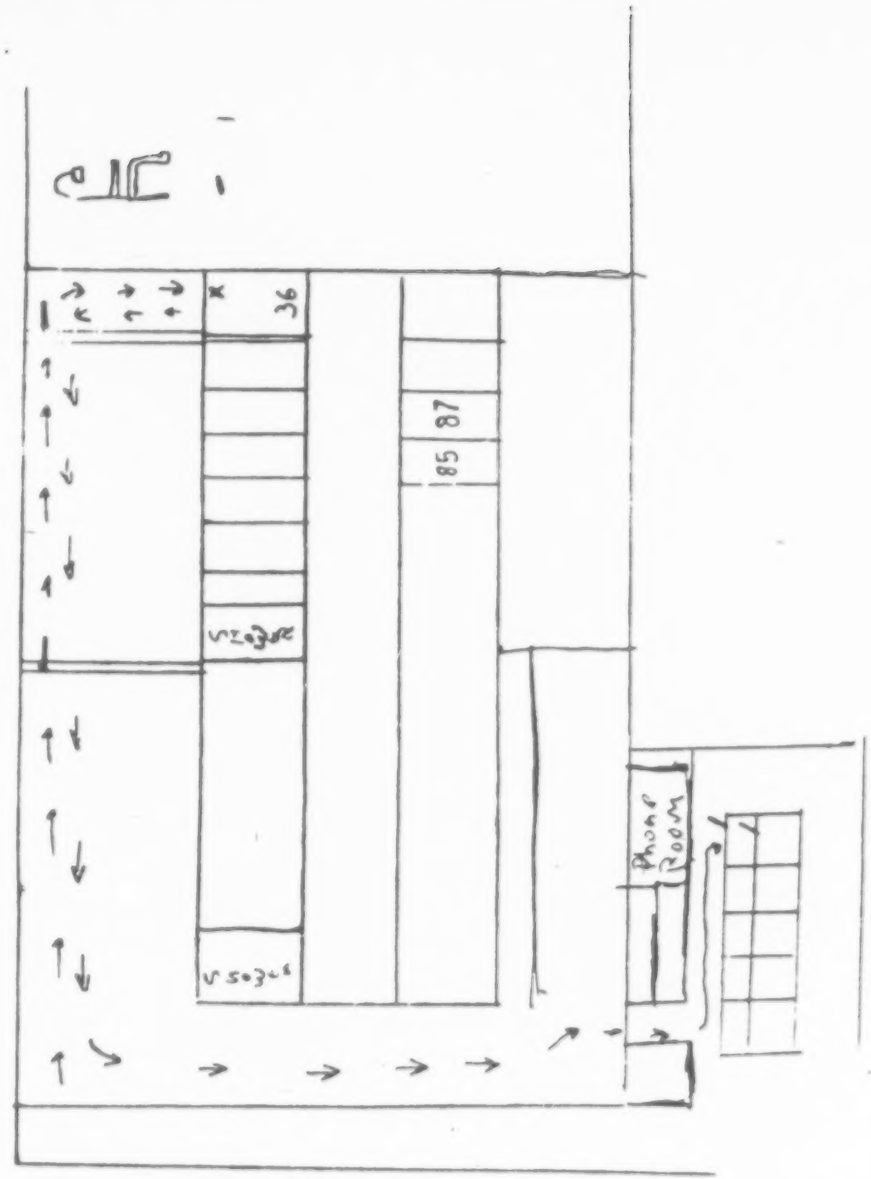
I have read the foregoing Second Amended (Civil Rights) Complaint With A Jury Demand and hereby verify that the matters alleged therein are true, except as to matters alleged on information and belief, and, as to those, I believe them to be true. I certify under penalty of perjury that the foregoing is true and correct.

Executed at Somers, Connecticut on April 19, 1965.

John McCarthy

John J. McCarthy

(7)



JUL 19 1982

CIDENT REPORT

Facility: CCI/CCC C.I. Somers

Location: C.C.I.S. Seg. Unit F-Blk. Date & Time: 7 / 13 / 82 3:15 AM (PM) (circle

INMATE(S) NAME (print)	ID #	AGE	COMMENTS/STATUS
McCarthy. John	14163		

STAFF NAME(S) (print)	Title	NAME	Title
Mickiewicz. F.	C/O		
Lusa. P.	C/O		
Jorge. C.	C/O		

TEXT ~~Inmate McCarthy. 14163~~ was given numerous orders to by C/O Mickiewicz to move to another cell in F-Blk. Subject refused to comply with this order and stated to officers that you can come and get me. Inmate McCarthy had tied his cell door in two different spots to prevent its opening. As we opened his door he made a sudden lunge towards his bed. At this point the order was given to disperse the duster. Subject was then handcuffed and escorted to the isolation area. (cont)

Signed J. Mackiewicz (1st Sat) Title C/O Date 7 / 14 / 82 Time 10:00 (AM) PM

ACTION/DISPOSITION (Check as applicable)

Use of Force _____ Mace X Restraints Handcuffs date/time removed 3:30 PM

DR X Assigned to: _____ ISOL X SEG _____ HOSP _____ 15 min. watch _____

Contraband disposition: _____

Injuries: Name	(check) Staff	Inmate	TYPE	Where Treated

Property damage to: _____ repairs requested _____ completed _____

CONTACTS: Warden/Supt/Duty Off. _____ date/time _____

OUTSIDE AGENCY _____ Dept _____ date/time _____

(police/fire) _____ Dept _____ date/time _____

Central Office _____ date/time _____

_____ date/time _____

OTHER ATTACHED REPORTS: Med Inct _____ UOF Suppl _____ Mace ✓ Other _____

If State Police Investigation, CASE # _____

If a staff member was assaulted during this incident, does she/he request criminal prosecution?

No _____ Yes _____ Signed _____

COMMENTS/RECOMMENDATIONS: _____

Review: Shift Supervisor _____ Date 7/15/82

Warden/Superintendent _____ Date 7/16/82

CN6080 REV 1/82

CIDENT REPORT McCarthy 14163 PAGE 2 of 2

Facility: CCI/CCC C.C.I. Somers Incident date 7 / 13 / 1982

Time 3:15 AM (PM)

TEXT (continued): Upon shaking down Mc Carthy's cell after this incident a "shank" approximately ten inches in length was found there.

Signed L.A. Tyni Title FF date 7/13/82

time 9:00 (AM) PM

STATE OF CONNECTICUT
DEPARTMENT OF CORRECTION

USE—OF—FORCE SUPPLEMENTARY REPORT

This form to be submitted with COR 38 (Use of Force Report) only when more than one staff member is involved in a use of force or assault incident.

I. IDENTIFICATION

C.C.I. Somers | McCarthy, John | 14163
Institution | Inmate Name: Last First Middle Inital | Inmate No.

II. OFFICER'S REPORT

A. Circumstances leading to Use of Force or Assault by Inmate:

TIME MONTH DAY YEAR OF INCIDENT

3:15 PM 7/13/82

I was assisting other officers to move McCarthy. 14163 who had been ordered to move from F-36 to F-85. McCarthy had his cell door tied up to prevent opening it. He was ordered three times and still refused to move. He held his hand behind him hiding what I thought to be a weapon. I was ordered to "gas" Mc Carthy as we opened his door and he was moving toward ~~xxxxxxx~~ his bed. He was then handcuffed and moved to another cell.

B. Type and Extent of Forceful Action: Include Equipment Employed, if any:

A three second burst of gas.

I held his left hand behind him while he was being handcuffed.

C. Complete (only when appropriate) by staff member if assaulted by inmate.
Do you feel that inmate(s) should be considered for criminal prosecution?
☐ Yes ☐ No

D. Lusa, Paul | C/O | Paul Lusa
NAME | TITLE | SIGNATURE

COR 49
Revised 10/70
Local Reprod. Auth.

CCI-SOMERS

USE OF MACE REPORT FORM

In accordance with Administrative Directive 2.2, the following information will be recorded and a copy attached to the appropriate Incident Report.

DATE July 13, 1982 TIME 3:20 (am) (pm)

AUTHORIZED BY: Lt Steven A. Tolier (Supervisor)
(please print)

FIRED BY: Correctional Officer P Lusa
(please print)

INMATE(S) WEAPON USED ON: McCarthy, John Number # 14163

APPROXIAMATE DOSAGE SPENT: 3 Second Burst

COMMENTS: Subject was given numerous direct orders to move out of his cell, he refused, as the officers started to enter his cell Inmate McCarthy lunged towards his Pillow, thinking he was going after a weapon it was at this point that the chemical agent was dispersed.

NOTE: After Inmate McCarthy was removed from his cell, the cell was shaken down and a shank approximatly 10" long with a blade approximatly 6" long was found in his cell.

SUPERVISOR'S SIGNATURE Steven A. Tolier Date 7/13/82

State of Connecticut

DIVISION OF PUBLIC DEFENDER SERVICES

OFFICE OF PUBLIC DEFENDER
121 ELM STREET
NEW HAVEN, CONNECTICUT 06507
789-7477 789-7479

July 23, 1982

Mr. John McCarthy
P.O. Box 100
Somers, CT 06071

Dear Mr. McCarthy:

After speaking to you on Wednesday, I spoke to Douglas Nash, the habeas corpus attorney in our office. Mr. Nash advised me that the best way for you to proceed in your new habeas corpus action (concerning the voluntariness of your guilty plea) is to fill out and file one of the state habeas corpus petition forms that are available at the prison. You can simply check the appropriate item in paragraph 5 as to the grounds for your petition. Once that is filed, it will be referred to Attorney Nash, and he will then meet with you to discuss the case.

As far as having photographs taken of your injury, I have been in touch with Alex Cybulski, an Assistant Warden at the prison. He advised me today that pictures will be taken as soon as possible, but that the photos will be kept in your central file until needed for any subsequent proceedings. If there should prove to be any undue delay in this matter, feel free to contact me.

Very truly yours,

Richard Emanuel

Richard Emanuel
Assistant Public Defender

RE/gh

CN6200
REV 2/80
Local Repro Auth
Page 1 & 2 of 3 Pages

CONNECTICUT DEPARTMENT OF CORRECTION
DISCIPLINARY REPORT

Choice of Advocate
1. None
2.
3.
4.
Declines Advocate ☐

I. IDENTIFICATION OF INMATE

C.C.I. Somers — McCarthy, John — 14163 F-43
Corr. Facility — Last Name — First — Middle I. — Inmate Number

II. OFFICER'S REPORT

A. CHARGE(S): Disobeying a direct order — 3:15 PM — 7/13/82
(See Codification on Back of Page) — Time — Month Day Year of Offense

B. REPORTING OFFICER(S):

Signature Dickiewicz, F. — Title C/O — Time 8:15 AM — Month Day Year of Report 7/14/82

C. DELIVERY OF CHARGE(S): I hereby cerifty that at 3:45 pm on this 14th day of July 1982 I have served notice on this inmate that he will be given a hearing on this charge before the Disciplinary Committee on 16 7 82 and I have given him a copy of the charge.
Da. Mo. Yr.
Signature Richard Kobylarz Jr. Title C/O

D. OFFICER'S STATEMENT OF CHARGE(S): (Describe circumstances of offense giving elements of charge, disposition of physical evidence, if any, unusual inmate behavior, and staff or inmate witnesses.)

Inmate McCarthy, 14163 was given a direct order to move from F-36 to F-85. Inmate McCarthy refused to obey my order. He said, " I am not going anywhere, if you want me, come in and get me." Other officers were called from the Hall and McCarthy was moved to F-43.

III. INVESTIGATION

A. REPORT OF INVESTIGATOR: (Include names of staff and/or inmate witnesses if available and as required.)

The accused readily admits the allegations. He indicated that he was angry because of an earlier incident and as a result, responded in an inappropriate manner.

B. INVESTIGATOR

Signature J Tupas Title Capt. — Month July Day 15 Year of Investigation 1982

IV. INMATE DATA

2-26-81 — 20 — Adm/Seg — 3-10-86 — 27 — F-43
Month Day & Year of Admission — Prior Reports — Work Detail — Min. Exp. Date — Age — Living Quarters

V. DISPOSITION OF CHARGES BY DISCIPLINARY COMMITTEE:

A. Not Guilty — Guilty — 7-16-82
Plea — Finding — Month Day Year of Action

B. Disciplinary Action Punitive Seg Indef.

C. Good Time Loss Recommended 60 Days L.G.T.

D. Disciplinary Committee Members: Mr. Rubba — C/O Felix
Recorder T/O D'Andrea
Chairman — Signature

VI. WARDEN'S REVIEW — Signature — Date 7/20/82

VII. COMMISSIONER'S APPROVAL — Signature — Date 60

Distribution: Page 1 to Institutional Record — Page 2 to Central Office — Page to Inmate

172

CN6200
REV 2/80
Local Repro Auth
Page 1 & 2 of 3 Pages

CONNECTICUT DEPARTMENT OF CORRECTION
DISCIPLINARY REPORT

Choice of Advocate
1. [illegible]
2.
3.
4.
Declines Advocate ☐

I. IDENTIFICATION OF INMATE

CCIS — MCCARTHY — JOHN — Middle I. — 14163 Inmate Number
Corr. Facility — Last Name — First

II. OFFICER'S REPORT

A. CHARGE(S): [redacted] CONTRABAND / 1045PM JULY 13 1982
(See Codification on Back of Page) — Time — Month Day Year of Offense

B. REPORTING OFFICER(S):

HIGGINS — Signature — Title — Time 1045PM — Month JULY — Day 13 — Year of Report 1982

C. DELIVERY OF CHARGE(S): I hereby cerifty that at [illegible] on this 14 day of July 19 82 I have served notice on this inmate that he will be given a hearing on this charge before the Disciplinary Committee on [illegible] and I have given him a copy of the charge.
Da. Mo. Yr.
Signature C/O Tremblay Title C/O

D. OFFICER'S STATEMENT OF CHARGE(S): (Describe circumstances of offense giving elements of charge, disposition of physical evidence, if any, unusual inmate behavior, and staff or inmate witnesses.)

WHILE CONDUCTING A SHAKE DOWN OF F 36, C/O'S DUDEK AND HIGGINS FOUND AN APPROX. 10INS. SHANK WITH A BLADE OF APPROX. 6 INS. IN THE PROPERTY OF INMATE MCCARTHY

III. INVESTIGATION

A. REPORT OF INVESTIGATOR: (Include names of staff and/or inmate witnesses if available and as required.)

The [illegible] was taken to this writers cell - #36 - by C/O Dudek - Higgins from the floor of the cell and the other inmates were removed. This cell is in his area.

B. INVESTIGATOR

Signature [illegible] Title Lt. — Month 7 Day 14 Year of Investigation 1982

IV. INMATE DATA

2-26-81 — 21 — Adm/Seg — 3-10-86 — 27 — F-43
Month Day & Year of Admission — Prior Reports — Work Detail — Min. Exp. Date — Age — Living Quarters

V. DISPOSITION OF CHARGES BY DISCIPLINARY COMMITTEE:

A. Not Guilty — Guilty — 7-16-82
Plea — Finding — Month Day Year of Action

B. Disciplinary Action Concurrent to Report dated 7-13-82 3:15 P.M.

C. Good Time Loss Recommended: Same as Above -

D. Disciplinary Committee Members: Mr. Rubba — C/O Felix
Recorder T/O D'Andrea
Chairman — Signature

VI. WARDEN'S REVIEW — Signature — Date 7/20/82

VII. COMMISSIONER'S APPROVAL — Signature — Date

Distribution: Page 1 to Institutional Record — Page 2 to Central Office — Page to Inmate

D. CIPLINARY HEARING SUMMAR

cility C.C.I. Somers Date 7-16-82

cused McCarthy, John # 14163

e (s) of Disciplinary Report (s) 7-13-82

arges 1.) disobeying a direct order (see #30)

fense Classification (s) B Advocate declined

tnesses declined

mmittee Members Cpt Rooney (chairman); Mr. Rubin; Jo. Felix

ea 1.) not guilty Finding guilty

sposition pun seg 7 days; recommend a loss of 60 days m&t

MMENTS

: Evidence on which finding was based subject was found guilty based upon the officers misconduct report

: Reasons for disposition The above disposition was deemed appropriate in light of subject's refusal to cooperate with an Administrative Procedure (all charges) which presents a serious breach of security in segregation area

corder's signature Frederick Dedden Jr CMO

te: Inmates may appeal Disciplinary Committee actions by writing to the head of the institution within 15 days of the findings, stating why the disposition should be changed.

py given to inmate _____ By _____
Date Time Staff Member delivering report

JUL 23 1982

Warden

D. CIPLINARY HEARING SUMMAR

cility C.C.I. Somers Date 7-16-82

cused McCarthy, John # 14163

e (s) of Disciplinary Report (s) 7-13-82

arges 1.) Continued "Class A" (see #15)

fense Classification (s) A. Advocate declined Mr. Pia

tnesses declined

mmittee Members Cpt Rooney (chairman); Mr. Rubin; Jo Felix

ea 1.) not guilty Finding Guilty

sposition pun seg 7 days, recommend loss of 60 days m&t

MMENTS

: Evidence on which finding was based subject was found guilty based upon the officers misconduct report and on physical evidence (shank) confiscated upon a shakedown

: Reasons for disposition The above disposition was deemed appropriate in light of subject presenting a serious breach of security by his possession of Contraband (homemade shank).

corder's signature Frederick Dedden Jr CMO

te: Inmates may appeal Disciplinary Committee actions by writing to the head of the institution within 15 days of the findings, stating why the disposition should be changed.

py given to inmate _____ By _____
Date Time Staff Member delivering report

STATE OF CONNECTICUT
EPARTMENT OF CORREC ON
340 CAPITOL AVENUE • HARTFORD, CONNECTICUT 06106

WILLIAM A. O'NEILL
GOVERNOR

JOHN R. MANSON
COMMISSIONER

NOTIFICATION OF GOOD TIME FORFEITURE

Date: 8/1/82

TO: John McCarthy #14163, CCI, Somers

RE: Institutional Disciplinary Committee Hearing of 7/16/82

No. of Days to be Forfeited and/or Amount of Fine* : 60 days

The above action has taken into consideration your written statement concerning the charges (or your option to refrain from making such a plea on your own behalf) within 15 days of disposition of the disciplinary committee.

In the absence of further disciplinary committee action and with exemplary conduct, you may apply through the institution for restoration of the good time forfeited after the passage of 9 months.

John R. Manson
Commissioner

cc: Warden/Superintendent

*NOTE: All fines are payable within 30 days of receipt of this notification.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

JOHN J. McCARTHY	)	
	)	
-v-	)	Civil Action No. H-83-278 (JAC .
	)	
CARL ROBINSON, Et Al.	)	(Civil Rights)

PROOF OF SERVICE

John J. McCarthy states under the penalty of perjury that he mailed a copy of the Motion For Leave to File A Second Amended Complaint and the Summonses and a copy of the Second Amended (Civil Rights) Complaint With a Jury Demand to counsel for those defendants who are already parties to this action (Carl Robinson and George Bronson) Patricia M. Strong, Assistant Attorney General, 340 Capitol Avenue, Hartford, Connecticut 06106, by placing them in an envelope and placed them in the "H-Block" mailbox at the Connecticut Correctional Institution, Somers, on April 19, 1985.

P L A I N T I F F
John J. McCarthy

John J. McCarthy, pro se
Post Office Box 100
Somers, Connecticut 06071

Service certified pursuant to Rule 5(b), F.R.C.P. this 20th day of April, 1985.

John J. McCarthy, pro se

APPENDIX 10

MORNING SESSION

10:00 O'CLOCK A.M.

THE COURT: Good morning, ladies and gentlemen.

This morning, ladies and gentlemen, we are here on Civil No. H-83-278 (JAC). This is McCarthy vs. Carl Robinson, and the purpose of our meeting this morning is to try this matter to its conclusion.

Now, before we get started, there are a few housekeeping matters we should take up. The first is the consent to proceed before the United States Magistrate, and it has been signed by the State, but let me explain to Mr. McCarthy what that is and then he has a choice of what he wishes to do.

On cases that are assigned from a District Court Judge to Magistrate for trial, they can be done in one of two ways: They can be tried before the Magistrate sitting as the District Court Judge with the permission of both the Plaintiffs and the Defendants, and then the Magistrate enters a final order which is then appealable usually to the District Court Judge or

to the Second Circuit, depending on how the form is printed and how the parties agree.

If that is not an acceptable way, then the trial continues as the Magistrate being a fact-finder, and the Magistrate makes a recommendation to the District Court Judge -- in this case it is Judge Cabranes -- and that's the procedure that we go through. So you have your choice at this time. It makes no difference to me. Whichever way you prefer. The State is willing to go with the Magistrate as the fact-finder, but you do not have to.

MR. McCARTHY: Okay. Then we will have to reschedule the trial; right?

THE COURT: No. We go forward either way. We go under the Magistrate being the final fact-finder or being the recommended fact-finder. Either way, we go forward.

MR. McCARTHY: I would rather have the District Court Judge hear the case.

THE COURT: All right.

MR. McCARTHY: Are we still going to hear the case?

THE COURT: We are still going to hear the case.

MR. McCARTHY: Okay.

I will just stipulate to that. I would rather have the District Court Judge hear the case.

THE COURT: All right.

Then there will be no consent. I will return to the consent form. The Court will take it and issue a recommended finding at the conclusion of the case.

MR. McCARTHY: Okay.

THE COURT: That doesn't mean you will get another trial before the District Court Judge. He has to review my findings and review my decision.

MR. McCARTHY: So I will appeal directly to him.

THE COURT: You can do that this way, too.

MR. McCARTHY: I will go like we are doing now. I would rather he heard it.

THE COURT: You are going to be heard either way.

MR. McCARTHY: I am just saying I want to make a point that I stipulate to that fact, that I don't consent.

THE COURT: You don't consent.

MR. McCARTHY: Right.

THE COURT: All right.

Then I will return this to the Clerk of the Court. Now, can you tell me, or -- let me tell you how we are going to proceed so both of you will understand.

We will proceed today until 4:00 o'clock. If there are still matters to be -- if it is not concluded by that time, we will again reconvene here, I believe it is next Thursday, and continue the case at that time. We are not going day to day. We have to go Thursday to Thursday.

I would like to have an idea from each side how many witnesses you have and approximately how long you think it will take. So I will start with the Plaintiff first.

Mr. McCarthy, how many witnesses do you have?

MR. McCARTHY: Okay.

I would like to call all the Defendants in this case and --

THE COURT: How many Defendants are there?

MR. McCARTHY: Didn't the Court make

APPENDIX 11

Cited in Clark v Poulton pp. 6166-68

LEGISLATIVE HISTORY
P.L. 94-577

UNITED STATES MAGISTRATES—JURISDICTION

P.L. 94-577, see page 90 Stat. 2729

Senate Report (Judiciary Committee) No. 94-625, Feb. 3, 1976 [To accompany S. 1283]

House Report (Judiciary Committee) No. 94-1609, Sept. 17, 1976 [To accompany S. 1283]

Cong. Record Vol. 122 (1976)

DATES OF CONSIDERATION AND PASSAGE

Senate February 5, October 1, 1976

House October 1, 1976

The House Report is set out.

HOUSE REPORT NO. 94-1609

[page 1]

The Committe on the Judiciary to whom was referred the bill (S. 1283) to improve judicial machinery by further defining the jurisdiction of United States magistrates, and for other purposes, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

* * * * * * * * * *

[page 2]

PURPOSE OF THE BILL

The purpose of the bill is to amend section 636(b), title 28 United States Code, in order to clarify and further define the additional duties which may be assigned to a United States Magistrate in the discretion of a judge of the district court. These additional duties generally relate to the hearing of motions in both criminal and civil cases, including both preliminary procedural motions and certain dispositive motions. The bill provides for different procedures depending upon whether the proceeding involves a matter preliminary to trial or a motion which is

[page 3]

dispositive of the action. In either case the order or the recommendation of the magistrate is subject to final review by a judge of the court.

The purpose of the amendments to the Senate act are as follows:

(1) The first amendment clarifies the intent of Congress that all motions to dismiss, and therefore dispositive motions, will be subject to the procedures of subparagraphs (B) and (C). Therefore such motions, which may be heard by the magistrate, will be determined by the judge, and those portions of findings and recommendations to which objection is made will require a de novo determination by the judge. This conforms to the intent of the Senate and the Judicial Conference, as well.

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(2) The second amendment emphasizes and clarifies when a de novo determination must be made by the judge. The Committee believed that the S. 1283 was not clear with regard to the type of review afforded a party who takes exceptions to a magistrate's findings and recommendations in dispositive and posttrial matters. The amendment to subparagraph (b)(1)(C) is intended to clarify the intent of Congress with regard to the review of the magistrate's recommendations; it does not affect the substance of the bill. The amendment states expressly what the Senate implied; i.e. that the district judge in making the ultimate determination of the matter, would have to give fresh consideration to those issues to which specific objection has been made by a party.

The use of the words "de novo determination" is not intended to require the judge to actually conduct a new hearing on contested issues. Normally, the judge, on application, will consider the record which has been developed before the magistrate and make his own determination on the basis of that record, without being bound to adopt the findings and conclusions of the magistrate. In some specific instances, however, it may be necessary for the judge to modify or reject the findings of the magistrate, to take additional evidence, recall witnesses, or recommit the matter to the magistrate for further proceedings.

The approach of the Committee, as well as that of the Senate, is adopted from the decision of the United States Court of Appeals for the Ninth Circuit in *Campbell v. United States District Court for the Northern District of California*, 501 F.2d 196 (9th Cir.), cert. denied, 419 U.S. 879 (1974)[1] The clarifying amendment merely draws upon the language of the Campbell decision to a greater extent:

> In carryng out its duties the district court will conform to the following procedure: If neither party contests the magistrate's proposed findings of fact, the court may assume their correctness and decide the motion on the applicable law.
>
> The district court, on application, shall listen to the tape recording of the evidence and proceedings before the magistrate and consider the magistrate's proposed findings of fact and conclusions of law. The court shall make a *de novo* determination of the facts and the legal conclusions to be draw therefrom.
>
> The court may call for and receive additional evidence. If it finds there is a problem as to the credibility of a witness or witnesses or for other good reasons, it may, in the exercise of

1. 95 S.Ct. 143, 42 L.Ed.2d 119.

[page 4]

> its discretion, call and hear the testimony of a witness or witnesses in an adversary proceeding. It is not required to hear any witness and not required to hold a *de novo* hearing of the case.
>
> Finally, the court may accept, reject or modify, the proposed findings or may enter new findings. It shall make the final determination of the facts and the final adjudication. . . . (501 F. 2d at 206)

(3) The third amendment to S. 1283, which is section 2 of the act, as amended, makes changes in the *habeas corpus* rules of procedure.[1] Those rules were originally promulgated by the Supreme Court on April 26, 1976. The House recently approved legislation (H.R. 15319) making some changes in them and providing that they shall take effect on February 1, 1976.[2]

Rule 8(b), tracking the present Magistrates Act and case law, sets forth the authority of magistrates with respect to evidentiary hearings in postconviction cases and proceedings. Rule 8(b), as it presently will take effect, authorizes a district court, by local rule, to improve a magistrate to recommend whether or not an evidentiary hearing is necessary in order to dispose of a petition under 28 U.S.C. § 2254 or a petition under 28 U.S.C. § 2255.

This legislation expands the authority of magistrates beyond that set forth in Rule 8(b) of the habeas corpus rules of procedure. It is therefore necessary to change Rule 8(b) in order to make it consistent with the provisions of this legislation. Section 2 of the bill, therefore, inserts language into Rule 8(b) that will bring it into conformity with this legislation.

STATEMENT

When the Congress enacted the Magistrates Act in 1968 (P.L. 90-578), it created a system of full-time and part-time judicial officers who would perform various judicial duties under the supervision of the district courts in order to assist the judges of these courts in handling an ever-increasing caseload.

In the 93rd Congress, the Judiciary Subcommittee on Improvements in Judicial Machinery held 17 days of hearings, during which extensive inquiry was made into the caseload of federal district courts. During these hearings, the chief judges of 44 of the federal judicial districts personally appeared and testified before the subcommittee. The vast majority of the chief judges who testified stated that the magistrates were of assistance to the court in handling certain preliminary matters in both civil and criminal cases, and were of greatest assistance in handling petitions for the issuance of a writ of habeas corpus made by both state and federal prisoners in an effort to obtain a collateral review of the original conviction. A few of the district courts which had not made extensive use of the services of the magistrates were encouraged to do so as a means of freeing time of district court judges to preside at trials of other cases.

[1] Rule Governing Section 2254 Cases in the United States District Court and Rules Governing Section 2255 Proceedings for the United States District Courts.
[2] H.R. 15319 passed the House on September 14, 1976, by a vote of 339-4. *See* House Report No. 94-1471.

[page 5]

In several of the districts, the majority of the judges of the court authorized magistrates to hold evidentiary hearings in habeas corpus cases and to submit to a judge of the court recommended findings of fact and conclusions of law dispositive of the petition for a writ of habeas corpus. The recommendations of the magistrate would be reviewed by the judge who would then exercise the ultimate authority to issue an appropriate order.

However, on June 26, 1974, in the case of *Wingo* v. *Wedding*, 418 U.S. 461,[2] the Supreme Court of the United States interpreted Section

636(b) of Title 28 of the U.S. Code, as authorizing the magistrate to make merely a "preliminary review" of a prisoner petition and expressly held that the statutory language did not evidence any intent by Congress that the magistrate be authorized to hold an evidentiary hearing in a habeas corpus proceeding.

In a dissenting opinion, the Chief Justice and Justice White dissented on the basis that Section 636(b) "should be interpreted to permit magistrates to conduct evidentiary hearings in federal habeas corpus cases", since such an interpretation would serve the principle objectives of the Magistrates Act. The dissenting opinion concluded with the following statement:

> In any event, now that the Court has construed the Magistrates Act contrary to a clear legislative intent, it is for the Congress to act to restate its intentions if its declared objectives are to be carried out.

The bill under consideration by the committee would accomplish this restatement and clarification of the Congressional intention that the magistrate should be a judicial officer who, not only in his own right but also under general supervision of the court, shall serve as an officer of the court in disposing of minor and petty criminal offenses, in the preliminary or pretrial processing of both criminal and civil cases, and in hearing dispositive motions and evidentiary hearings when assigned to the magistrate by a judge of the court.

In addition to *Wingo* v. *Wedding* there are several other court decisions the result of which would be overcome by passage of this bill. In *T.P.O.* v. *McMillan* (7th Cir. 1972) 460 F.2d 348, the court held that a magistrate could not hear a motion to dismiss or a motion for summary judgment, even though an appeal was allowed from a final order of a magistrate to a judge of the district court. In *Ingram* v. *Richardson* (6th Cir. 1972) 471 F.2d 1268, the court held that a magistrate had no power to review the Secretary's denial of social security benefits and to make proposed findings of fact and conclusions of law which proposed order was then submitted to a district court judge for final decision. In *T.P.O.* v. *McMillon*, supra, the court stated:

> We need not speculate in regard to what civil functions the magistrate can constitutionally perform, however, since Congress carefully intended that in regard to civil cases the magistrate was not empowered to exercise ultimate adjudicatory or decision making.

2. 94 S.Ct. 2842, 41 L.Ed.2d 879.

[page 6]

Also, in *Wilver* v. *Fischer* (10th Cir. 1967) 387 F.2d 66, which predated the Magistrates Act, the court held that a master could not be appointed to supervise discovery proceedings in civil actions.

Since introduction of S. 1283, the Supreme Court of the United States granted certiorari in *Weber* v. *Secretary of HEW*, 503 F.2d 1049 (CA 9 1064), and on January 14, 1976, resolved the conflict between *Ingram* and *Matthews* concerning the power of a district court to assign, under section 636(b), to a magistrate an action to review

a final determination of the Secretary of Health, Education and Welfare on the question of whether a person was entitled to social security benefits. In *Matthews* v. *Weber* (January 14, 1976) 423 U.S. 261,[3] 44 LW 4065, the Supreme Court held that under section 636(b) it was competent for the court to assign as "additional duties" of the magistrate an action to review an award of Social Security benefits. The Supreme Court noted that the reference to the magistrate was "to prepare a proposed written order or decision, together with proposed findings of fact and conclusions of law where necessary or appropriate". Under subsection (b)(1)(B) of section 636 as amended by S. 1283, the magistrate could be given similar responsibilities with reference to certain dispositive motions, to applications for post-trial relief and to prisoner petitions brought under section 1983 of title 42 U.S. Code.

In 1968, when the Magistrates Act was passed, the total filings in the United States District Courts were 102,000 cases. In 1974, total filings amounted to 143,000 cases. In 1968, there were 323 district court judges. In 1974, there were 400 district court judges. The Congress in enacting the Magistrates Act manifested its intention to create a judicial officer and to invest in him the power to furnish assistance to a judge of the district court. The magistrate was given jurisdiction over petty criminal offenses and the Act also gave each district court the discretionary power to use the magistrate to assist a district court judge "in the conduct of pretrial or discovery proceedings in civil or criminal actions" and to make a "preliminary review of applications for posttrial relief" and to submit a report and recommendations "to facilitate the decision of the district judge having jurisdiction over the case as to whether there should be a hearing".

The language quoted above is from the 1968 Magistrates Act. In *T.P.O.* v. *McMillan*, the decision restricting the power of magistrates in pretrial proceedings hinged on the judicial interpretation of congressional intent. Similiarly, in *Wingo* v. *Wedding* the authority of the magistrate to hold an evidentiary hearing in a habeas corpus proceeding also hinged on an interpretation of congressional intent.

It seems to the committee that in 1968 the Congress clearly indicated its intent that the magistrate should be a judicial officer whose purpose was to assist the district judge to the end that the district judge could have more time to preside at the trial of cases having been relieved of part of his duties which required the judge to personally hear each and every pretrial motion or proceeding necessary to prepare a case for trial. That the magistrate has fulfilled this function seems clear from the statistics relating to magistrate activity in fiscal year 1976. In this year magistrates handled a volume of matters as shown in the following table:

3. 96 S.Ct. 549, 46 L.Ed.2d 483.

[page 7]

In fiscal year 1976 magistrates handled a volume of matters as shown in the following table:

Criminal cases:	
Minor offenses	11,692
Petty offenses	78,474
Arrest warrants	22,531
Search warrants	6,068
Bail hearings	48,616
Preliminary examinations	7,142
Removal hearings	1,727
Subtotal	176,250
Post indictment arraignments	18,694
Pretrial conferences	5,397
Pretrial motions	7,861
Probation revocation	726
Other criminal matters	2,918
Subtotal	35,596
Total criminal matters	211,846
Civil cases:	
Prisoner petitions	8,231
Pretrial conferences	17,559
Motions	9,583
Special master reports	684
Social security cases	1,480
Other civil matters	2,761
Total civil cases	40,298

Rather than constituting "an abdication of the judicial function", it seems to the committee that the use of a magistrate under the provisions of S. 1283, as amended, will further the congressional intent that the magistrate assist the district judge in a variety of pretrial and preliminary matters thereby facilitating the ultimate and final exercise of the adjudicatory function at the trial of the case.

The Federal Rules of Civil Procedure provides many opportunities for the parties by motion to invoke a decision of the court. These opportunities range from a motion under Rule 6(b) to extend the time for an act, or a motion under Rule 4(e) specifying the manner of serving a summons, to a motion under Rule 12(b) to dismiss, or a motion under Rule 56 for summary judgment on the grounds that there is no genuine issue of fact to justify a trial. In between these extremes are various motions relating to discovery, to production of evidence, to physical examination of a party, to join necessary or proper parties, to set the time and place of a disposition, to suppress evidence, and to hold a pretrial conference under Rule 16, and others too numerous to mention.

Without the assistance furnished by magistrates in hearing matters of this kind, and others not specifically named, it seems clear to the committee that the judges of the district courts would have to devote a substantial portion of their available time to various procedural steps rather than to the trial itself.

Therefore, the committee has concluded that the enactment of S. 1283, as amended, will further improve the judicial system by clearly

defining the additional duties which a judge of the district court may assign to a magistrate in the exercise of the discretionary power to so assign as contained in Section 636(b) of Title 28 United States Code as herein amended.

Before turning to a detailed explanation of the bill, the committee believes that it should comment upon the contention that Article III of the Constitution imposes a limitation upon the judicial functions which this bill vests in a magistrate. In the federal court system, the primary court of general jurisdiction has always been the district court and, as such, it is an "inferior court" ordained and established by the Congress under Article III. But this is not to say that the Congress may not create other inferior courts. For example, it is believed that it would be competent for the Congress to create below the district courts a court of limited jurisdiction which would be roughly the equivalent of a municipal court in some of the state systems. Multi-tiered court systems developed simply in recognition of the fact that certain cases and judicial functions are of differing importance so as to justify different treatment by the court system. While the U.S. District Court has long been a single tiered court as far as original jurisdiction is concerned, the Congress has nevertheless recognized that it is not feasible for every judicial act, at every stage of the proceeding, to be performed by "a judge of the court".

In several instances, the Congress has vested in officers of the court, other than the judge, the power to exercise discretion in performing an adjudicatory function, subject always to ultimate review by a judge of the court. For example, a judgment or order of a referee in bankruptcy, adjudicating legal rights, is a final order unless an appeal is taken to a judge of the district court. Title 11 U.S.C., section 67(c); Rule 801, Rules of Bankruptcy Procedure.

Also, section 636(a)(3) of Title 28 vests in the magistrates the power to try persons accused of minor criminal offenses, which power was formerly vested in a United States Commissioner. Thus, under section 3401 of Title 18 United States Code, the magistrate has jurisdiction to try minor offenses and under section 3402 of Title 18, an appeal may be taken from the judgment of the magistrate to a judge of the district court.

Finally, section 1920 of Title 28 United States Code authorizes "a judge or clerk of any court" to tax costs in a case. Rule 54(d) of the Rules of Civil Procedure implements section 1920 by providing that costs may be taxed by the clerk on one day's notice and that on notice "the action of the clerk may be reviewed by the court". Therefore, by analogy, the committee believes that the judicial functions vested in the magistrates, as a judicial officer, by this bill are not in violation of Article III of the Constitution.

Explanation of the Bill

No changes are made in section 636(a) of title 28 under which magistrates exercise the powers with respect to issuance of arrest warrants, search warrants, setting bail, preliminary hearings, and the trial of minor and petty offenses under section 3401 of title 18, United States Code.

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The bill revises in its entirety section 636(b) under which magistrates could be assigned certain additional duties in the discretion of the court. This discretionary power to assign additional duties to a magistrate is continued but the discretion is vested in a judge of the district court rather than in a majority of all the judges of the court. Of course the scope of any permissible additional duties to be assigned can still be agreed upon by a majority of the judges, but the bill will permit exercise of the actual power of assignment to a single judge. Since assignments are frequently made in individual cases, or on an ad hoc basis, it seems preferable to vest the power in a single judge who can execute any required order of assignment or reference.

The initial sentence of the revised section uses the phrase "notwithstanding any provision of law to the contrary—". This language is intended to overcome any problem which may be caused by the fact that scattered throughout the code are statutes which refer to "the judge" or "the court". It is not feasible for the Congress to change each of those terms to read "the judge or a magistrate". It is, therefore, intended that the permissible assignment of additional duties to a magistrate shall be governed by the revised section 636(b), "notwithstanding any provision of law" referring to "judge" or "court".

The additional duties which can be assigned to a magistrate are classified into three categories set forth in subparagraphs (A) and (B) of subsection 636(b)(1) and in subsection 636(b)(2). These categories and the scope of the magistrate's authority are as follows:

1. Pretrial matters.—Under subparagraph (A) a judge, in his discretion, may assign any pretrial matter to be heard and determined by a magistrate. In scope, this includes a great variety of preliminary motions and matters which can arise in the preliminary processing of either a criminal or a civil case. As indicated by the statistical table set forth earlier in this report many of the magistrates are already hearing these pretrial matters under the authority contained in subsection 636(b)(2) of the present law. A statement was received at the Senate hearing on July 16, 1975, from Chief Judge Belloni of the District of Oregon setting forth a description of the various motions and pretrial proceedings which have been assigned to Magistrate Juba by the judges of the Oregon Court. A similar scope of additional duties is intended for magistrates under the provisions of S. 1283, as amended. Thus, the revised law will not unduly extend the magistrates' authority to hear pretrial matters but it will clarify the broad authority to refer "any pretrial matter".

Subject to the exception of the dispositive motions expressly named in subparagraph (A), the magistrate shall have the authority to not only hear the pretrial matter but also to enter an order determining the issue raised by the motion or proceedings. The magistrate's determination is intended to be "final" unless a judge of the court exercises his ultimate authority to reconsider the magistrate's determination.

The last sentence of subparagraph (A) makes it clear that a judge of the court has the ultimate judicial prerogative to review and reconsider a motion or matter "where it has been shown that the magistrate's order is clearly erroneous or contrary to law". The standard of "clearly erroneous or contrary to law" is consistent with the accepted and existing practice followed in most district courts when reviewing a pretrial matter assigned to a magistrate under existing law.

Use of the words "may reconsider" in subparagraph (A) is intended to convey the congressional intent that a matter "heard and determined" by the magistrate need not in every instance be heard a second time by the judge. However, if a party requests reconsideration based upon a showing that the magistrate's order is clearly erroneous or contrary to law then the judge must reconsider the matter. Of course, the judge has the inherent power to rehear or reconsider a matter *sua sponte*.

Thus, the revision proposed in this bill makes it clear that Congress intends that the magistrate shall have the power to make a determination of any pretrial matter (except the enumerated dispositive motions) and that his determination set forth in an appropriate order shall be "final" subject only to the ultimate right of review by a judge of the court. Under section 631 of the Magistrate Act (28 USC 631), a magistrate is required to be a member of the bar whose experience in the practice of law has been such as to persuade the appointing judges that he is competent to perform the duties of the office. If a particular magistrate does not have this competence it is assumed that a judge would not assign particular matters to the magistrate for hearing and determination. However, assuming such competence, it seems to the Committee to be inefficient and duplicative to require a "report and recommendation" from the magistrate to the judge as a prelude to a separate order by the judge in order to dispose of preliminary and pretrial matters. Thus the statute uses the term "hear and determine" in vesting the authority of a magistrate, subject, of course, to ultimate review by the court.

While subparagraph (A) does not specify a procedure to be followed by a party in obtaining reconsideration of a magistrate's order by the judge, it would normally be by motion duly served, filed and noticed. However, in some districts the local rules now in existence provide merely that the request for review be in a letter or other written form. Nor is a fixed time specified within which to obtain review of a magistrate's order in "any pretrial matter", since what is a timely request to a judge of the court will depend upon the nature of the pretrial matter. For example, an order by the magistrate under Rule 13(f) granting leave to serve and file an amended pleading asserting an omitted counterclaim, could be reviewed by a judge in due course and at a time set by the court or noticed by the parties. In such an instance there would be ample time within which the matter could be reconsidered. On the other hand, suppose a pretrial order under Rule 16 is issued by the magistrate following a pretrial conference held a week or less before a day certain setting for trial. In that instance, time is of the essence and review of the order by a judge should be sought and the matter reconsidered as soon as possible. Thus, under subparagraph (A), it is intended that the method and procedure for seeking reconsideration of a magistrate's determination of a pretrial matter can be set by local rules of court pursuant to section 636(b)(4), or by uniform rules, if uniformity is deemed necessary.

2. Dispositive motions, Habeas Corpus, and Prisoner Petitions.—As stated previously in this report, certain motions which are dispositive of the litigation are specifically excepted from the magistrate's power under subparagraph (A) "to hear and determine". These excepted motions are:

(1) A motion for injunctive relief;
(2) A motion for judgment on the pleadings,
(3) A motion for summary judgment;
(4) A motion to dismiss or quash an indictment made by the defendant;
(5) A motion to suppress evidence in a criminal case;
(6) A motion to dismiss for failure to state a claim upon which relief can be granted; and,
(7) A motion to involuntarily dismiss an action for failure to comply with an order of the court.

It is not intended that a magistrate shall have the power under subparagraph (A) "to hear and determine" such dispositive motions. However, depending upon the qualifications and competence of a particular magistrate, it is intended that under subparagraph (B) a judge of the court, in his discretion, may assign such dispositive motions to a magistrate for hearing and submission of proposed findings and recommendation to a judge of the court for ultimate disposition.

Not only may these dispositive motions be assigned to the magistrate under subparagraph (B) but also there may be assigned application for posttrial relief made by individuals convicted of criminal offenses and petitions under section 1983 of title 42 United States Code brought by prisoners' challenging the conditions of their confinement. The authority of the magistrate under subparagraph (B) is clearly more than authority to make a "preliminary review". It is the authority to conduct hearings and where necessary to receive evidence relevant to the issues involved in these matters. Therefore, passage of S. 1283, as amended, will supply the congressional intent found wanting by the Supreme Court in *Wingo* v. *Wedding*, supra. Also this bill will overcome the effect of the decision in *T.P.O.* v. *McMillan*, supra, relating to motions to dismiss or motions for summary judgment. Further, passage of this bill will also permit a judge to refer to a magistrate the consideration and study of cases brought to review the Secretary's determination of entitlement to benefits under the Social Security Act, since these matters usually involve a motion by the agency for summary judgment.

Under subparagraph (B) the magistrate is required to submit proposed findings and his recommendation to the judge for disposition of the various proceedings included in subparagraph (B). As specified in subparagraph (C) a copy of the proposed findings and recommendation must be mailed to all parties. Written objections must be filed within 10 days. This is substantially the procedure and the time limit specified in Rule 53 where there has been a reference to a master. The bill would permit the court by local rules to specify whether the written objections must be in the form of a motion or other written form, as well as to specify any procedure for bringing the matter on for a formal hearing, if a formal hearing is to be required.

The judge is given the widest discretion to "accept, reject or modify" the findings and recommendation proposed by the magistrate, including the power to remand with instructions. Thus, it will be seen that under subparagraph (B) and (C) the ultimate adjudicatory power over dispositive motions, habeas corpus, prisoner petitions and the like is exercised by a judge of the court after receiving assistance from and the recommendation of the magistrate.

3. Special Master and Trial by Consent.—The third category of magistrates' additional duties is set forth in the proposed subsection 636(b)(2). The subsection expressly authorizes the magistrate to be appointed as a special master under Rule 53 of the Federal Rules of Civil Procedure. This merely carries forward the same provision in section 636(b)(1) of the existing law. This also carries with it a requirement that if a party objects to the reference to a master, the requirements and restrictions of Rule 53 must be met.

The second sentence of this subsection provides an exception to this the magistrate, to serve where one of the parties objects to the reference. This exception takes such cases out from the restrictions of Rule 53(b), which limits the conditions under which cases may be referred to a master, since no significant purpose is served by restricting the use of magistrates where the parties agree to this procedure. At the same time, Rule 53 contains many important rules governing the powers of masters, the conduct of proceedings before them, and the submission of reports. Thus, subsection 636(b)(2) retains these provisions in any case in which a magistrate is appointed as a special master.

Enactment of this new subsection 636(b)(2), and experience in the use of magistrates as special masters, may serve to occasion a reappraisal of the power of the court to appoint a special master, i.e., the magistrate, to serve where one of the parties objects to the reference. [See, *La Buy* v. *Howes Leather Co.* (1957), 352 U.S. 249.][4] Indeed, the magistrate is not an attorney in private practice "appointed on an ad hoc basis" and the magistrate is experienced in judicial work.

Other Provisions of the Bill

Proposed subsection 636(b)(3) provides for the assignment to a magistrate of any other duty not inconsistent with the Constitution and laws of the United States. A similar provision is contained in the existing legislation. This subsection enables the district courts to continue innovative experimentations in the use of this judicial officer. At the same time, placing this authorization in an entirely separate subsection emphasizes that it is not restricted in any way by any other specific grant of authority to magistrates.

Under this subsection, the district courts would remain free to experiment in the assignment of other duties to magistrates which may not necessarily be included in the broad category of "pretrial matters". This subsection would permit, for example, a magistrate to review default judgments, order the exoneration or forfeiture of bonds in criminal cases, and accept returns of jury verdicts where the trial judge is unavailable. This subsection would also enable the court to delegate some of the more administrative functions to a magistrate, such as the appointment of attorneys in criminal cases and assistance in the preparation of plans to achieve prompt disposition of cases in the court.

If district judges are willing to experiment with the assignment to magistrates of other functions in aid of the business of the courts, there will be increased time available to judges for the careful and unhurried performance of their vital and traditional adjudicatory duties, and a consequent benefit to both efficiency and the quality of justice in the Federal courts.

4. 77 S.Ct. 309, 1 L.Ed.2d 290.

Proposed subsection 636(b)(4) permits each district court to adopt local rules of court governing the performance of these duties by magistrates in the district. This requirement is carried over from the existing statute. It ensures that a magistrate will not be so burdened by assignments from one judge that he cannot assist the other judges in the district. Further, by requiring the promulgation of such local rules of the court, the statute provides the local bar at least some advance notice of the potential assignment of a case to a magistrate. As discussed previously in this report, these local rules may also specify procedures for obtaining reconsideration of a magistrate's order under subparagraph (A) and may supplement the procedure for objection to proposed findings and recommendations under subparagraphs (B) and (C).

BACKGROUND

S. 1283 was passed by the Senate on Feb. 5, 1976. Hearings on the issue of magistrate jurisdiction were held in the Senate Judiciary Subcommittee on Improvements in Judicial Machinery on July 16, 1975, and in this Committee's Subcommittee on Courts, Civil Liberties, and the Administration of Justice on June 20, 1975, and July 18, 1975, when the original H.R. 6150 was being considered. The bill has the support of the Justice Department, the Administrative Office of the U.S. Courts, and the Judicial Conference. It also has the personal support of many judges who have written to express their needs for increased assistance from the magistrates. One judge, the Hon. Damon J. Keith (Chief Judge, U.S. District Court for the Eastern District of Michigan) wrote Mr. Kastenmeier that the Speedy Trial Act's implementation, the 300% increase in criminal case filings in the past six years, among other reasons, necessitated this legislation. On the national level, civil and criminal filings rose by 12% in the federal district courts. The need for this legislation is apparent, and this Committee voted to report it favorably on Sept. 15, with the previously mentioned amendments.

OVERSIGHT

Oversight of the federal courts and magistrate system is the responsibility of the Committee on the Judiciary. S. 1283, as well as S. 2923, is a response to the needs for increased assistance to the federal judges.

STATEMENT OF THE COMMITTEE ON GOVERNMENT OPERATIONS

No statement has been received on the legislation from the House Committee on Government Operations.

STATEMENT OF THE CONGRESSIONAL BUDGET OFFICE

Pursuant to clause 7, rule XIII of the Rules of the House of Representatives, and section 403 of the Congressional Budget Act of 1974, the Committee estimates there is no cost to the legislation. The CBO letter follows.

APPENDIX 12

WORDS AND PHRASES

PERMANENT EDITION

1658 TO DATE

Volume 8

Common—Condition Subsequent

All Judicial Constructions and Definitions of Words and Phrases by the State and Federal Courts From the Earliest Times, Alphabetically Arranged and Indexed

Kept to Date by Cumulative Annual Pocket Parts

ST. PAUL, MINN.
WEST PUBLISHING CO.
APPENDIX 12
page A89

CONDENSER—Cont'd

of soft iron is wound a certain number of turns of copper wire, each turn being insulated by a layer of paper or some other insulating material; then on top of this coarser wire is wound, in the same direction, a large number of layers of very thin wire, each one likewise insulated by a layer of paper or other insulating material, and the fine wires connect with the two poles on top, and the coarser wires connect with the lower, with the commutator running from one pole to the other. This box is filled with what is called "condenser," which is a series or number of plates of tin foil, that stores up electricity somewhat on the principle of the Leyden jar and keeps it stored, so that when a person uses it he gets a much greater shock than he would if the condenser was not there. It is used in schools and universities, by physicians, and to explode mines and dynamite cartridges. It has no practical use in telegraphing, and is commonly used for illustrating the law of electrical induction. It is a "philosophical instrument," within the tariff acts. Robertson v. Oelschlaeger, N.Y., 11 S.Ct. 148-150, 137 U.S. 436, 34 L.Ed. 744.

CONDIMENT

A "condiment" is something used to give a relish to food and to gratify the taste, usually a pungent and appetizing substance, as pepper or mustard, seasoning. U. S. v. 254 Cases and 499 Cases, Each Containing 48 Cans, of an Article Labeled, in part, "Net Contents 10 oz. Avoir. Baby Brand Tomato Sauce", D.C.Ark., 63 F.Supp. 916, 923.

A "condiment" is a "food" and not a "medicine." The "International stock food" is a "food or condiment" within the meaning of the Kentucky pure food law, Laws Ky. 1906, c. 48, and its sale is subject to regulation thereunder. Savage v. Scovell, C.C.Ky., 171 F. 566.

Chewing tobacco is not a food, "beverage," "condiment," or a drug, but the manufacturer must exercise great care to see that it does not contain poisonous substances. Pillars v. R. J. Reynolds Tobacco Co., 78 So. 365, 368, 117 Miss. 490.

"Condiment," according to Webster, and as generally understood, is something "used to give relish to food and to gratify the taste; a pungent and appetizing substance; seasoning." Capers, which are pungent flower buds, when pickled in vinegar and

CONDIMENT—Cont'd

intended for use in flavoring sauces and as a relish are a "condiment," dutiable under Act 1897, par. 241, 30 Stat. 170, as "pickles and sauces of all kinds," rather than as provisions. S. S. Pierce Co. v. United States, C.C.Mass., 176 F. 440, 441, 443, 444.

CONDITION

CONDITION—Cont'd

In general

Where insurance policy used both disease or "condition," the latter word is more elastic and significant in its nature than the former and means the state or mode in which a person or thing exists. Union Casualty Co. v. Montelione, 8 O.L.A. 327.

Under § 3283, Rev.Stat., authorizing municipality and railroad company to agree upon manner, terms and conditions upon which public street or other ground may be used or occupied by railroad, "manner" means the method or mode by which tracks are laid; "terms" means the boundary, limit or extent of the grant; and "conditions" means stipulations precedent to enjoyment of the grant. Cleveland, C. C. & St. L. Ry. Co. v. City of Cincinnati, Goebel's Prob.R. 269.

A distinction between "conditions" and "exceptions" is that a condition subsequent always presupposes an absolute obligation which is to be avoided or annulled, whereas an exception is an exclusion from a general obligation of a certain class or classes, which, were it not for the exclusion would be comprehended within the subject covered by the general obligation. Clemens v. Mutual Reserve Fund Life Ass'n, 11 Ohio Dec. 717, 8 Ohio N.P. 587.

"Conditions" are provisions in contracts, charters and deeds, upon which the existence of a right depends; a provision that the existence of the right shall exist upon the happening or not happening of some event. Newark Gas & Fuel Co. v. City of Newark, 8 Ohio Dec. 418, 421, 7 Ohio N.P. 76.

Credit for prior teaching experience was a "condition" within statute providing that salary of teacher might not be less than that

In gener Cont'd

fixed by s...dules and schedule "conditions" adopted by board of education and on file in office of State Commissioner of Education. Kramer v. Board of Ed. of City of New York, 84 N.Y.S.2d 874, 877, 194 Misc. 128.

The word "condition" is the equivalent of "requisite" or "requirement" and denotes something attached to and made a part of a grant or privilege. Chambers v. Owens-Ames-Kimball Co., 67 N.E.2d 439, 442, 146 Ohio St. 559, 165 A.L.R. 1373.

Recourse against property of operator and subrogation of owner to rights against operator as "conditions" to statutory liability of owner of motor vehicle for injuries from use. Baugh v. Rogers, Cal., 148 P.2d 633, 639, 152 A.L.R. 1043.

The words "school purposes" within deed do not create a "condition" on the fee. Board of Education of Taylor County v. Board of Education of City of Campbellsville, 166 S.W. 2d 295, 296, 292 Ky. 261.

A statement in contract of sale descriptive of thing sold, if intended to be part of contract, is a "condition". Iuliucci v. Rice, 32 A.2d 459, 461, 130 N.J.L. 271.

The governor in exercising powers of commutation of sentence may attach reasonable conditions to his act of clemency and they become a "condition" of the benefit granted to the prisoner. People ex rel. Von Moser v. New York State Parole Board, 39 N.Y.S.2d 200, 202, 179 Misc. 397.

"Condition" referred to any condition imposed upon the United States in permitting alien to re-enter his home country pursuant to deportation order, and did not preclude deportation to country which imposes any condition upon deportee after his re-entry. Glikas v. Tomlinson, D.C.Ohio, 49 F.Supp. 104, 108.

The word "conditions" as used in Uniform Sales Act provision authorizing seller to reserve right of possession or property in goods until certain conditions have been fulfilled does not indicate legislative intent that only one condition can be imposed which must be certain. In re Halferty, C.C.A.Ill., 136 F.2d 640, 644.

Existence of trust receipt on conditionally sold trucks did not affect the sale contract and was not a "condition" of the sale within statute requiring conditional sales contracts to contain all the "conditions" of the sale,

In general— t'd

where anyone acquiring buyer's rights under the sale contract would take the trucks free of intruster's security interest. Premium Commercial Corporation v. Kasprzycki, 29 A.2d 610, 613, 614, 129 Conn. 446.

Conditional sale contract of trucks was not invalid as failing to contain all the "conditions" of the sale because it referred to the dealer holding the trucks under a trust receipt, as the "seller", where the receipt so far as the buyer was concerned authorized the seller to sell the trucks and he had sold the trucks to the buyer. Premium Commercial Corporation v. Kasprzycki, 29 A.2d 610, 613, 614, 129 Conn. 446.

Where intruster under trust receipt of trucks was given a security interest to secure a loan from the intruster to the holder of the trucks, intruster was given a "lien" on the trucks and "title" remained in the holder, and hence holder's conditional sale contract representing that holder had title and providing that it should remain in him was not invalid as inaccurately stating the "conditions" of the sale. Premium Commercial Corporation v. Kasprzycki, 29 A.2d 610, 613, 614, 129 Conn. 446.

The co-operation clause of an automobile liability policy constituted a material "condition" of the policy. Cameron v. Berger, 7 A.2d 293, 295, 336 Pa. 229.

A city sewer discharging offensive unpurified effluent into a stream so as to create a nuisance was the "proximate cause" of the nuisance and not a "condition", entitling a lower riparian owner to recover from city. Huber v. City of Blue Earth, 6 N.W.2d 471, 473, 213 Minn. 319.

The amendment of Street Improvement Act requiring a suit to foreclose lien of improvement bond to be maintained within four years after due date of last installment is a "statute of limitation" rather than a "condition" restrictive of a litigant's right to proceed. Ritter v. Franklin, 123 P.2d 866, 868, 50 Cal.App.2d 844.

Diligence in rescinding a contract is "mandatory" and is a "condition" of right to rescind, and, in action for rescission, complaint showing unreasonable delay is demurrable unless it states sufficient facts to show that, notwithstanding delay, there was diligence under the facts pleaded. Clanton v. Clanton, 126 P.2d 639, 642, 52 Cal.App.2d 550.

In general—Cont'd

Under contract for sale of corporate stock creating fund from which buyer as trustee was to pay debts of corporation, irregularity in purchaser's handling of fund did not release sellers from agreement for payment of corporation's expenses from fund, since purchaser's duty to follow designated procedure arose from "promise" and not a "condition." Johnston v. Rothwell, 87 P.2d 13, 15, 54 Wyo. 99.

The statement that an act or omission is a "condition" and not a cause of an occurrence from which injury results means no more than that it is not a "proximate cause" of that occurrence. Kinderavich v. Palmer, 15 A.2d 83, 88, 89, 127 Conn. 85.

Conduct having only a remote connection with production of accident has been spoken of as a "condition" rather than a cause of the final occurrence, but properly understood, to say that conduct is a "condition" rather than a cause means no more than that it is a remote and not a proximate cause, a remote circumstance which merely gave rise to the occasion for the injury. Kinderavich v. Palmer, 15 A.2d 83, 88, 127 Conn. 85.

"Unconditional ownership" of property required by standard fire insurance policy is an ownership of an estate without condition, and the word "condition" does not refer to a title which is defective but not conditional. Miller v. Yorkshire Ins. Co., 297 N.W. 377, 379, 237 Wis. 551, 133 A.L.R. 1341.

Under life policy providing for disability benefits insured shall become totally and permanently disabled, subject to "conditions and provisions" that insured shall furnish proof of disability and that premiums following receipt of proof will be waived, the making of proofs of disability within any limit of time and before death was not made a "condition" of liability to pay disability benefits. Love v. Northwestern Nat. Life Ins. Co., C.C.A.Tex., 119 F.2d 251, 253.

Under a conveyance of a house and lot upon the consideration of a certain sum to be spent for repairs thereon and "agreement of the party of the second part, my son, to furnish me and my husband a home as long as we live", such agreement by the grantee was not a "condition" to the vesting of absolute title in grantee, but merely an obligation, the failure to comply with which would not de-

In general— t'd

feat grantee's title, but merely give rise to cause of action for damages. House v. House, 13 S.E.2d 817, 819, 191 Ga. 678.

Where testatrix devised residue of estate to devisees in fee simple and by subsequent clause empowered executrix to convey all property owned by testatrix at her death and to give good title, clause giving executrix power to sell the property was not inconsistent with the devise in fee simple, but devisee took land in fee subject to the power of sale given to executrix which power of sale was not a limitation on the fee but a "condition" attached to it. William's Guardian v. Ferrell's Ex'x, 151 S.W.2d 1029, 1030, 286 Ky. 754.

Where appropriation for legal services for the state contained recital that all attorneys authorized by the act to be employed by any department or agency and all attorneys compensated out of any moneys appropriated by the General Assembly should be appointed by the Attorney General and be in all respects subject to statute which placed the Attorney General in charge of the commonwealth's department of law, the recital was a "provision" or "condition" which told by whom the attorneys were to be employed and from what source they could expect compensation, and was not an "item" within Governor's veto power. Commonwealth v. Dodson, 11 S.E.2d 120, 130, 176 Va. 281.

Legislative declaration that no part of money appropriated for administration of state planning board should be used for the investigation of county government was a "condition" and was not an "item" within Governor's veto power. Commonwealth v. Dodson, 11 S.E.2d 120, 130, 176 Va. 281.

A "condition" will not be raised by implication for mere declaration in deed that grant is made for special and particular purpose, without being coupled with words appropriate to make such condition, but such recitals are usually construed as giving rise, at most, to implied covenant that grantee will use property conveyed only for specified purpose. Williams v. Johnson, 143 S.W.2d 738, 739, 740, 284 Ky. 23.

A provision in contract of sale of a used engine to mining company that seller, a foreign corporation, would dismantle engine from its location, reinstall it on mining company's property, and run a test, was a "guar-

In general—Cont'd

anty" which was fulfilled, and was not a "condition" intended to survive its acceptance and give purchaser further time for trial and examination. Chiquita Mining Co. v. Fairbanks, Morse & Co., 104 P.2d 191, 195, 60 Nev. 142.

Where defendant, operating truck on highway consisting of four paved lanes and wide, hard, dry shoulders, stopped truck on paved portion of highway to replace dragging spare tire, failed to turn on lights or put out flares, and decedent collided with rear of defendant's truck, whether the presence of the unlighted truck on the paved portion of the highway was a mere "condition" and not the "proximate cause" of the collision was for the jury. Wilson v. Decatur Cartage Co., 39 N.E.2d 379, 313 Ill.App. 148.

Where adult plaintiff, in violation of ordinance, was riding on handle bars of bicycle along narrow street on which cars were parked solidly on both sides and an automobile was passing in approximately the center of the street, and bicycle struck large hole in street which could not have been avoided, the hole was "proximate cause" of accident and plaintiff's violation of ordinance was merely a "condition" which made possible his propulsion into the path of the automobile to his injury, and did not bar his recovery from the city. Penwitt v. City of Chicago, 43 N.E.2d 159, 161, 315 Ill.App. 444.

The presence of smoke, snow, fog, mist, blinding headlights or other similar elements, materially impairing or wholly destroying visibility of objects ahead of motorist, are not "intervening causes", absolving such motorist from liability for death of pedestrian struck by automobile, but "conditions" imposing on motorist duty to assure safety of public by exercising degree of care commensurate with such surrounding circumstances. Nichols v. Havlat, 1 N.W.2d 829, 834, 140 Neb. 723.

Where by-law of association organized under Maryland law permitted member to withdraw capital contribution on 15 days' notice but association reserved right to withhold the contribution until withdrawing member had removed all advertising matter indicating membership, the by-law provision was binding on a member as a "condition" of receiving refund of capital contribution. Progressive Grocers' Ass'n v. Golden, 128 F.2d 318, 319, 76 U.S.App.D.C. 21.

In general—Cont'd

Under Fair Labor Standards Act provision granting Administrator power to issue subpœna duces tecum, the Administrator is not obliged as a "condition" of obtaining an enforcement order of his subpœna, issued in an investigation to determine whether any person has violated any provision of the act, to make any showing that employer is engaged in commerce, since there is no limitation of the character of business done by the person investigated. Application of Holland, D.C.N.Y., 44 F.Supp. 601, 602.

In action for death of decedent who while riding on left running board of truck was crushed in collision with tractor trailer, an instruction that if decedent's negligence was a proximate cause of death, recovery could not be had but that if decedent merely afforded an opportunity for negligence of either or both defendants to result in death and was not a contributing cause, jury might find that decedent's negligence was a mere condition and not the proximate cause of death, was not erroneous as failing to distinguish between a cause and a "condition" which means that conduct involved is a remote and not a proximate cause. Cosgrove v. Shusterman, 26 A.2d 471, 474, 125 Conn. 1.

In action by infant wife for maintenance, wherein husband counterclaimed for divorce on ground of adultery, characteristics expressed in terms of blood grouping would be regarded as part of "physical condition", and wife, though suing by next friend, and child, would be regarded as "parties" within rule providing that in an action in which mental or "physical condition" of a "party" is in controversy, the court may order a physical examination, so that court had jurisdiction to order wife and child to submit to a blood grouping test for comparison of their blood with that of husband. Rules of Civil Procedure for District Courts, rules 17 (a), 35(a), 28 U.S.C.A. following section 723c; D.C.Code 1929, T. 14, § 75. "Condition" is a broad word. Among its meanings are quality, property, attribute, characteristic. Beach v. Beach, 114 F.2d 479, 481, 72 App.D.C. 318, 131 A.L.R. 804.

Where a husband, while owning realty with wife as tenants by entireties, gave mortgages on realty without joinder of wife, and husband and wife thereafter joined in deed conveying their title by entireties to bankrupt

In general—Cont'd

and another as tenants in common, "under and subject, nevertheless, to the payment of two mortgage debts * * *", quoted recital was a "condition" upon which bankrupt's title vested and depended, and doctrine of "estoppel by deed" was applicable precluding bankrupt from questioning validity of mortgages as to bankrupt's undivided one-half interest in realty, and hence mortgagee's petition for order that trustee's title to undivided one-half interest be declared subject to mortgage should have been granted especially where bankrupt estate had no equity over and above the mortgage. In re Solomon, D.C.Pa., 40 F.Supp. 62, 65.

Where government which was holder in due course of note executed by buyer for purchase price of heating system sent buyer letter suggesting that buyer sign release authorizing government representative to remove equipment and stating that when release was returned properly signed and possession of equipment had been obtained by government, buyer would be released and buyer signed release but government did not take possession of the equipment, the government required as a "condition" of accord that it obtain possession of the heating system and burden was on buyer to prove satisfaction of the accord. United States v. Jollimore, D.C. Mass., 44 F.Supp. 639, 641.

Statute requiring alternate plans and specifications for highway paving, where conditions do not require use of particular type, had purpose of making choice of type matter to be determined by competitive bidding, and "conditions" referred to physical conditions, not economic factors. Landsborough v. Kelly, 37 P.2d 93, 94, 1 Cal.2d 739, 96 A.L.R. 707.

A "condition" is something inserted in a deed for the benefit of the grantor, giving him the power, on default of performance, to destroy the estate if he will, and revest the estate in himself or his heirs. Smith v. Smith, 23 Wis. 176, 181, 99 Am.Dec. 153. A condition not only depends on the option of the grantor, but is controlled by equity in any case where the grantor attempts to make an inequitable use of it. Duryee v. City of New York, 96 N.Y. 477, 496.

Under Burns' Ann.St.1901, § 373, providing that in pleading the performance of a condition precedent in a contract it shall be sufficient to allege generally that the party

In general—Cont'd

performed all the "conditions" on his part, an allegation in an action on a policy "that plaintiff fully performed all the obligations required of her" was a substantial compliance with the statute. Security Accident & Sick Ben. Ass'n v. Lee, 66 N.E. 745, 746, 160 Ind. 249.

The word "condition," in Act March 20, 1897, § 2, providing that the warranty of any fact or "condition" incorporated in any policy of insurance purporting to be made or assented to by the assured, which shall not materially affect the risk insured against, shall be construed as representations only in any suit at law or equity on such policy, refers to facts existing, or said or supposed to exist, at the time the policy is made. Hoover v. Mercantile Town Mut. Ins. Co., 69 S.W. 42, 44, 93 Mo.App. 111.

"Receipts," whether for money or for property, are informal, nondispositive writings, open to explanation, modification, or contradiction by parol evidence. They may be of twofold character. It may be not only an acknowledgment or admission of the receipt of money or property in payment or satisfaction of a debt, but it may contain a contract distinct and independent, or, as expressed by Mr. Greenleaf, "terms, conditions, and agreements or assignments." Willoughby v. Hannon, 47 So. 241, 156 Ala. 585, adopting definition in Gravlee v. Lamkin, 24 So. 756, 120 Ala. 221.

Where practically all the output of a china manufacturer was sold to the United States, special classes manufactured for European trade cannot be said to be in "condition" to supply the American trade, within the meaning of Customs Administrative Act June 10, 1890, c. 407, § 19, 26 Stat. 139, providing that dutiable value shall be determined according to the "condition in which * * * merchandise is there bought and sold for exportation to the United States." United States v. Haviland & Co., C.C.N.Y., 167 F. 414, 418.

Within Code, § 3252, providing that no condition or restricted provision of a policy of insurance shall be valid as a defense to an action on the policy unless printed in certain sized type, the term "conditions" was not used in any narrow or technical sense, but was intended to cover any clause, expression, or provision included in or appended to a policy whereby the effect of the principal

In general—Cont'd

an essential part of the policy is modified, changed, restricted, or otherwise affected so as to materially influence the rights and liberties of the insurer thereunder; and it is of no consequence whether the language used be in the form of a condition or agreement. National Life Ass'n v. Berkeley, 34 S.E. 469, 97 Va. 571

A judgment granting the husband, because of the wife's use of intoxicants, a limited divorce for two years, though providing that at the end of two years either party "may proceed in the action as he or she shall deem for her best interest," is not an interlocutory judgment, authorized by St.1898, § 2883, in case of a decision leaving some condition to be performed; leaving it to the husband to ask for an absolute divorce at the end of the two years, on the record as it stood at the time of the trial, if in the meantime the parties had not been reconciled, though the wife had reformed, if such be the intent of the provision of the judgment, not being a "condition" within the meaning of the statute. Graham v. Graham, 136 N.W. 162, 163, 149 Wis. 602.

A complaint having predicated the negligence of the master on a "defect in the condition" of the ways, works, etc., a demurrer, in that the count showed no defect in the ways, work, etc., was inapt, under the statute permitting a recovery for a "defect in the condition" of, etc. The employment of the word "condition" widens the statute beyond what would have been its scope had only the word "defect" been used. If one claiming under the statute must show a defect in the ways, the effect would be to counteract the right therein declared, and this by denying the word "condition" its proper influence. Jones v. Tennessee Coal, Iron & R. Co., 50 So. 1017, 163 Ala. 266.

A "condition" is a qualification annexed to any estate whereby it is to arise, in which case it is called a "condition precedent" or is to be defeated, when it is styled a "condition subsequent." A deed in consideration of natural love and affection, whereby land is granted, bargained, sold, and released to the grantee, on condition that she shall hold and enjoy the same for life, and after her death to go to all her children, "to have and to hold all the premises heretofore mentioned unto said grantee, her heirs and assigns, forever," conveys a title in fee simple, and en-

In general—Cont'd

titles grantee's husband to a third interest therein on the death of the grantee; the condition being but an effort to set limitations on the fee simple, and cut it down to a life estate in the grantee not within the power of the grantor to accomplish. Chavis v. Chavis, 35 S.E. 507, 508, 57 S.C. 173.

The word "condition" is defined by Mr. Webster to mean "the mode or state of being; state or situation with regard to external circumstances; essential quality; property; attribute." Under an ordinance requiring a street railway company to keep the portions of streets between its railway tracks and two feet on each side thereof in as good repair and condition as the city keeps the balance of the streets, it is the duty of the company to pave the portions of streets between its said tracks, and two feet on each side thereof, when the city paves the balance of the streets. For when the city paves, if the company decline so to do, it cannot be said that it keeps the parts of the streets in question in as good condition, or in as good state of being or essential quality, as the city keeps the balance. In order to meet this obligation, the company must also pave. State v. Jacksonville St. R. Co., 10 So. 590, 596, 29 Fla. 590, 613, quoting Webster, Dict.

In an action for breach of contract to purchase coal, making fulfillment dependent upon "normal conditions," excusing seller's failure to deliver in case of "war, • • • insurrection, • • • disasters, breakdowns, fires, or other accidents at the mines, • • • shortage of cars, interruption of car service, strikes, labor agitations or disturbances, shortage of labor supply, or any other causes beyond the seller's control" and excusing buyer's refusal to accept deliveries "in case of strikes or other contingencies arising which are beyond the control of the buyer and which cause stoppage or partial stoppage of the plant or business of the buyer," the closing down of buyer's steel plant, because of business depression and the failure to obtain orders, did not justify buyer's refusal to accept deliveries, since the word "conditions" in the phrase "normal conditions" meant physical conditions affecting the industry and not general economic conditions, and the phrase "other contingencies" did not include business depressions, in view of the ejusdem generis rule. Cleveland & Western Coal Co. v. Cyclops Steel Co., 123 A. 320, 321, 278 Pa. 346.

and to a third interest of the grantee; the condition effort to set limitations and cut it down to a life not within the power accomplish. Chavis v. 508, 57 S.C. 173.

dition" is defined by Mr. mode or state of being; th regard to external cir quality; property; at ordinance requiring a any to keep the portions s railway tracks and two hereof in as good repair e city keeps the balance the duty of the company s of streets between its feet on each side there aves the balance of the he city paves, if the com o, it cannot be said that f the streets in question , or in as good state of uality, as the city keeps ler to meet this obliga ust also pave. State v Co., 10 So. 590, 596, Webster, Dict.

r breach of contract to g fulfillment dependent tions," excusing seller's case of "war, • • • disasters, breakdowns idents at the mines, of cars, interruption of labor agitations or dis of labor supply, or any l the seller's control" s refusal to accept de strikes or other con ich are beyond the con d which cause stoppage of the plant or business losing down of buyer's of business depression tain orders, did not jus o accept deliveries, since " in the phrase "normal ysical conditions affect d not general economic hrase "other contingen business depressions, in generis rule. Cleveland v. Cyclops Steel Co., 123 346.

Cause of injury distinguished

When the last chance doctrine is invoked in aid of a plaintiff, his negligence is admitted, but it is relegated from the position of a "proximate cause" to that of a "remote cause" or mere "condition" and facts must be alleged to bring a plaintiff within protection of the doctrine. Leedom v. Pennsylvania R. Co., Del.Super., 29 A.2d 171, 173.

Anchored ship's position in Hudson river in front of Jersey City Ferry slips, so as unnecessarily to obstruct passage of vessels to and from slips, was a "condition" and not a "cause" of collision between ship and ferryboat during strong flood tide, within meaning of rule that fault must be a cause, not a condition, of a collision, to hold a ship at fault, where master of ferryboat had had no difficulty in reaching the Jersey City terminal on previous runs on flood tide. The Jamestown, D.C.N.Y., 64 F.Supp. 946, 948.

Cause of injury distinguished

Even were it negligent for a ferry passenger to be standing at his horses' heads and not seated in the cabin when the boat violently struck a division piling, it would not bar his recovery for injuries from such collision; not being a proximate cause, but simply a condition. Griffee v. Delaware River Ferry Co., 102 A. 694, 695, 91 N.J.L. 280.

Where one driving along a street after crossing a street car track stopped so near it to converse with a person that there was not room enough for a car to pass, such position constituted a "condition" of the injury, and was not a cause of it. Redford v. Spokane St. Ry. Co., 46 P. 650, 651, 15 Wash. 419.

Where collision occurred while two automobiles were being driven through cloud of smoke that had drifted over highway, smoke was not an "efficient intervening cause" of accident, but was a mere "condition" which jury was entitled to consider in connection with other evidence in determining question of negligence. Anderson v. Byrd, 275 N.W. 825, 826, 133 Neb. 483.

Charge

The use of the word "condition" in charging on contributory negligence and proximate cause may be misleading and hence it is better to avoid its use in a charge and court may advantageously call attention of jury to question whether injury was an

Charge—C d

"extraordinary" as distinguished from a "normal" result of plaintiff's conduct as a circumstance to be considered by jury. Cosgrove v. Shusterman, 26 A.2d 471, 474, 129 Conn. 1.

The word "conditions," as used in Civ. Code, art. 1559, providing for the revocation of donations for nonfulfillment of eventual conditions, is synonymous with the word "charges"; and when a donation contains charges, it is considered as made under the condition that it may be dissolved, or revoked, if they are not executed. Voinche v. Town of Marksville, 50 So. 662, 663, 124 La. 712.

Conditional limitation and limitation distinguished

With respect to the term of a lease, a "limitation" differs from a "condition" in that in order to defeat the estate in the latter case, some act must be done. Airways Supermarkets v. Santone, 83 N.Y.S.2d 881, 883.

Lease provision authorizing landlord on default in payment of rent to terminate lease on five days' written notice to tenant constituted a "condition" and not a "conditional limitation" which would make the lease terminate by mere notice. 98 Delancey St. Corp. v. Barocas, 82 N.Y.S.2d 802, 805.

To terminate a lease in case of a "condition" some act must be done upon the happening of the contingent event, such as making an entry, whereas in case of a "conditional limitation" the mere happening of the event is in itself the limit beyond which the lease no longer exists. 6th Ave. & 24th St. Corp. v. Lyon, 82 N.Y.S.2d 806, 808, 196 Misc. 186.

A provision in lease authorizing landlord to cancel lease on three months' notice in event of a bona fide sale of premises, and not otherwise, is not a "condition". Rankin v. Homestead Golf & Country Club, 37 A.2d 640, 643, 135 N.J.Eq. 160.

A "limitation" marks the utmost time of continuance, while a "condition" marks some event, which, if it takes place in course of that time, will defeat the estate. Storke v. Penn Mut. Life Ins. Co., 61 N.E.2d 552, 555, 390 Ill. 619.

Husband's deed to wife "as long as she remains my wife," was not a "condition," but a valid "limitation," so that when wife died,

Conditional limitation and limitation distinguished—Cont'd

her estate terminated, and title vested in the husband, rather than in the wife's heirs. Charles v. Shortridge, 126 S.W.2d 139, 140, 277 Ky. 183.

A "conditional limitation" is distinguished from an "estate upon condition" in that the estate terminates upon the happening of the event expressed, while in case of an estate upon condition the estate is not defeated until the person who has the right to avail himself of the condition does so by entry. Hess v. Kernen Bros., 149 N.W. 847, 851, 169 Iowa 646.

A limitation marks the period which determines the estate, without any act on the part of who has the next expectant interest. Upon the happening of the contingency prescribed, the estate comes at once to an end, and the subsequent estate arises. The condition determines an estate after breach upon entry or claim by the grantor or his heir or the heirs of the devisor. Fowlkes v. Wagoner, Tenn., 46 S.W. 586, 592.

The difference between a "limitation" and a "condition" is that in the case of a "limitation" the estate determines as soon as the contingency happens without any act on the part of the person next in expectancy, while in the case of a "condition" the estate continues beyond the happening of the contingency unless the grantor or his heirs, or the devisor or his heirs, take advantage of the breach of condition and make an entry or claim in order to avoid the estate. Eastham v. Eastham, 231 S.W. 221, 222, 191 Ky. 617.

Provision of will that trust principal should pass according to donee's will "provided only" that at least half should be given to named beneficiary held to impose "limitation" and not "condition" upon power of donee, so that attempted exercise of power without required appointment to named beneficiary did not alone invalidate attempted exercise of power in its entirety. Old Colony Trust Co. v. Richardson, 7 N.E.2d 432, 434, 297 Mass. 147.

The distinction between an estate upon condition and the limitation by which an estate is determined upon the happening of some event is that in the latter case the estate reverts to the grantor or passes to the person to whom it is granted by limitation over upon the mere happening of the event

Conditional limitation and limitation distinguished—Cont'd

upon which it is limited, without any entry or other act, while in the former the reservation can only be made to the grantor or his heirs, and an entry upon breach of the condition is requisite to revest the estate. The provision for re-entry is therefore the distinctive characteristic of an estate upon condition. Hoselton v. Hoselton, 65 S.W. 1003, 1006, 168 Mo. 182.

In determining whether, in the case of estates greater than estates for years, the language constitutes a "condition" or a "conditional limitation," the rule applied is that, where an estate is so expressly limited by the words of its creation that it cannot endure for any longer time than until the condition happens on which the estate is to fail, this is limitation, but when the estate is expressly granted on condition in deed, the law permits it to endure beyond the time of the contingency happening, unless the grantor takes advantage of the breach of condition, by making entry. Lonas v. Stiver, 195 N.Y.S. 214, 215, 201 App.Div. 862.

Provision of lease that, if tenant continued in default in paying rent or performing covenants for 60 days, lease should terminate at landlord's option, and that landlord might give notice of intention to terminate and thereupon lease should immediately cease, held at most to provide a "condition" authorizing ejectment, and not a "conditional limitation" with right of summary proceeding; service of written notice that landlord has elected to terminate lease for breach of covenant not satisfying requirements of conditional limitation. Norman S. Riesenfeld, Inc., v. R. W. Realty Co., 217 N.Y.S. 306, 311, 127 Misc. 630.

Condition in life

The term "condition," as used in a statute relating to the property of a bankrupt, providing that there should be exempt to the bankrupt the necessary household and kitchen furniture, and such other articles or necessaries as his assignee should designate and set apart, having reference in the amount to the family and "condition" and circumstances of the bankrupt, but altogether not to exceed a certain specified sum, means his position, personal or relative, which he had occupied in life at and previous to his assignment. In re Ludlow, 1 N.Y.Leg.Obs. 322, 323.

Condition precedent

"Conditions," as used in an ordinance relating to corporations supplying natural gas within the limits of a city, declaring that the privileges granted should be enjoyed only on "the following conditions," is used in the sense of regulations, and not conditions precedent. Appeal of City of Pittsburgh, 7 A. 778, 787, 115 Pa. 4.

"Conditions," within the meaning of a statute providing that a railroad desiring to occupy a highway may agree with the public authorities upon the manner, terms, and conditions upon which the same may be used and occupied, has reference to stipulations precedent to the enjoyment of the grant. Cleveland C., C. & St. L. R. Co. v. City of Cincinnati, Ohio, 1 Prob.R. 269, 278.

It seems to be agreed in regard to all conditions, whether in a deed or a will, where the condition is in the nature of a consideration for the concession, its performance will be regarded as intended to precede the vesting of any right, and so a condition precedent. Merrill v. Wisconsin Female College, 43 N.W. 104, 74 Wis. 415, citing 2 Redf. Wills, 283.

By the word "condition" is usually understood some quality annexed to real estate by virtue of which it may be defeated, enlarged, or created upon an uncertain event; also qualities annexed to personal contracts and agreements are frequently called "conditions," and these must be interpreted according to the real intention of the parties. Bac.Abr. "Conditions." The learning in the books relates principally to the former kind. Conditions of the latter class rest upon the same general reasoning with those of the former. "Conditions precedent" are such as must be punctually performed before the estate can vest, but on a "condition subsequent" the estate is immediately executed; yet the continuance of the estate depends upon the breach or performance of the conditions. Selden v. Pringle, N.Y., 17 Barb. 458, 465, citing Bac.Abr.Cond. 1.

Consideration

Recital of twofold consideration, consisting in part of payment of money, and in part of user of property for designated purpose, does not constitute a "condition." Board of Public Education in Wilmington v. St. Patrick's Roman Catholic Church, 136 A. 833, 835, 15 Del.Ch. 286.

Consideration—Cont'd

A will devised land "upon the condition" that the devisee pay to the testator's widow during life a certain sum, which was made a charge upon the land; but no provision was made for a forfeiture of the title, nor was a devise over made in case of default of payment of such charge. Held, that the word "condition" was used in the sense of "consideration," and that the title was not conditional, but merely incumbered with the charge as a lien which might be foreclosed. Ditchey v. Lee, 78 N.E. 972, 974, 167 Ind. 267.

A deed to a corporation chartered "to provide medical attendance and medicines and hospital accommodations" recited that grantor, "for the consideration hereinafter stated," gave, granted, aliened, and confirmed to such corporation, "its successors and assigns forever," the said property, "to have and to hold the said premises under said party of the second part, its successors and assigns forever," and that "this deed is made upon the express condition and for the consideration that the real property hereby conveyed and the income therefrom shall be used by the party of the second part for benevolent purposes and in all respects in compliance with the objects for which said party of the second part is formed," and "it is hereby provided that the hospital to be erected on this land be named the V. Hospital." Held, that the deed did not create a condition subsequent, but that the word "condition" was used with the same idea as "consideration," which was that the real property and the income were to be used for the purposes of compliance with the object of the corporation. Victoria Hospital Ass'n v. All Persons, etc., 147 P. 124, 127, 169 Cal. 455.

Covenant distinguished

Provision in partial assignment of oil and gas lease, that if assignee had not procured approval of the Secretary of Interior within one year after delivery of assignment then assignment should be void, constituted a "condition" and not a "covenant", and upon failure of assignee to secure such consent, all assignee's rights thereunder were forfeited. Shaw v. Guaranty Liquidating Corp., 155 P.2d 53, 54, 67 Cal.App.2d 660.

A grantee's agreement to support grantor, when recited as consideration for a deed, will be treated as a "covenant" rather than a "condition" unless the deed clearly and ex-

Covenant distinguished—Cont'd

plici makes the agreement a condition. Hall v. Barrett, Tex.Civ.App., 126 S.W.2d 1045, 1048.

Whether a direction in the instrument creating a charitable trust arises to the dignity of a "condition" or whether it merely admits of the construction that it is a mere "covenant" depends upon intention of settlor as indicated by the writing. Pennebaker v. Pennebaker Home for Girls, 163 S.W.2d 53, 56, 291 Ky. 12.

Provision of oil and gas lease requiring payment of a specified royalty for wells producing gas not used off the premises was a "covenant", the breach of which would subject lessees to a suit for damages and not a "condition" breach of which would entitle lessors to cancellation of the lease. Freeman v. Magnolia Petroleum Co., Tex.Civ.App., 165 S.W.2d 111, 115, 116.

A provision of offer of Public Works Administration to make loan and grant for construction of municipal power and light plant that no obligation would be assumed by government unless administrator was satisfied that city had been unable to acquire property of private company operating in city under nonexclusive franchise, after reasonable efforts made in good faith, was not a "covenant" in a contract, but a "condition" of the offer by which city would not be bound if it elected to reject offer, and which could be performed, modified, or waived before contract was made. Southwestern Gas & Electric Co. v. City of Texarkana, C.C.A.Tex., 104 F.2d 847, 849.

"Covenants" differ from "conditions," in that breach of covenant merely gives right to maintain personal action and breach of condition works forfeiture. Bartell v. Senger, 155 A. 174, 176, 160 Md. 685.

The term "negative covenant," and not the word "condition," is correctly used to designate a provision in a deed that the premises thereby conveyed are not to be used for saloon purposes. Star Brewery Co. v. Primas, 45 N.E. 145, 147, 163 Ill. 652.

A covenant differs from a condition, in that in a proper case a court of chancery may enforce specific performance of the former, while it will not of the latter, for the reason that to do so would work a forfeiture of the estate; a court of equity not lending its aid to enforce a forfeiture. Northwestern Uni-

Covenant distinguished—Cont'd

versity v. esley Memorial Hospital, 128 N. E. 13, 18, 290 Ill. 205.

A "condition" is a qualification annexed to an estate by the grantor, whereby it may be enlarged, defeated, or created on an uncertain event, and it differs from "covenant" in this: that a condition is in the words of and binding on both parties, while a covenant is in the words of the covenantor only. Langley v. Ross, 20 N.W. 886, 887, 53 Mich. 163.

Clause in contract for sale of standing timber, allowing extension of time for cutting, "provided that grantee agrees to make reasonable efforts to cut and remove said timber within said five-year period," held "covenant," which is promise of only one party, rather than "condition" which binds both parties. Murphy v. Schuster Springs Lumber Co., 111 So. 427, 430, 215 Ala. 412.

The difference between a "covenant" and a "condition" in a contract relates largely to the remedy, and, if the breach of the agreement pertains to the validity of the instrument, or is a ground for forfeiture, it is a condition, while, if the remedy for a breach is merely an action at law for damages, the agreement is a covenant. Cavanagh v. Iowa Beer Co., 113 N.W. 856, 858, 136 Iowa, 279.

"A 'condition' differs from a 'covenant' in that the legal responsibility of nonfulfillment of a covenant is that the party violating it must respond in damages, while the consequence of the nonfulfillment of a condition is a forfeiture of the estate. If it be doubtful whether a clause in a deed be a covenant or a condition, the courts will decide against the latter construction." Woodruff v. Woodruff, 16 A. 4, 7, 44 N.J.Eq. (17 Stew.) 349, 1 L.R.A. 380.

Provision in life policy requiring that insured be alive and in sound health at date of insurance held "condition" and not "covenant," and operated more strongly for insurer than covenant that answers in application were deemed warranties. Youngblood v. Prudential Ins. Co. of America, 165 A. 667, 668, 109 Pa.Super. 20.

A "condition" in a deed is something reserved in it for the benefit of the grantor empowering him on default of performance to destroy the grantee's estate and revest it in himself or his heirs, while a "covenant" is an agreement or consent of two or more by deed

Covenant distinguished—Cont'd

in writing sealed and delivered, whereby either one promises to the other that something is done or will be done in the future. Perkins v. Kirby, 85 A. 648, 651, 35 R.I. 84.

An agreement in a lease to give a chattel mortgage on personalty as security for future payments of rent is a "condition," which as a mutual agreement is binding on both parties, and a breach of which will work a forfeiture of the estate, rather than a "covenant," which binds only the covenantor, and whose breach only warrants the recovery of damages. Knight v. Black, 126 P. 512, 514, 19 Cal.App. 518.

Standard mortgagee clause in fire policy providing that mortgagee should on demand pay premium if mortgagor failed to do so held not "covenant" but "condition" which if not complied with by mortgagee precluded his recovery from insurer, and hence insurer could not recover unpaid premiums from mortgagee. Insurance Law, § 121. St. Lawrence County Farmers Ins. Co. v. Thompson, 270 N.Y.S. 898, 150 Misc. 532.

Clause in deed requiring grantee to erect dwelling within three years held to be covenant not authorizing re-entry rather than "condition," since "condition" is not for benefit of other land, and its benefit does not run with land, but it is right reserved to grantor which he and his heirs alone can enforce, and is not an estate nor interest in real property nor assignable chose in action. Carruthers v. Spaulding, 275 N.Y.S. 37, 39, 242 App.Div. 412.

Where mortgage clause contains only an agreement by mortgagee to give notice of any change of ownership that may come to his knowledge, agreement is a "covenant" for breach of which action for damages will lie, and not a "condition" breach of which will defeat recovery on fire policy. Phœnix Mut. Life Ins. Co. for Use of First Nat. Bank v. Ætna Ins. Co., 59 S.W.2d 517, 519, 166 Tenn. 126.

Provision in New York standard mortgagee clause in fire policy that mortgagee shall, on demand, pay premium is a "condition" and not a "covenant," so that insurer cannot sue mortgagee for recovery of unpaid premium, but on mortgagee's failure, on demand, to pay premium, insurer acquires vested right to cancel policy. Prudential Ins. Co. of America v. Franklin Fire Ins.

Covenant distinguished—Cont'd

Co. of Philadelphia, 185 S.E. 537, 538, 180 S.C. 250.

A mining lease under seal, stipulating that the lessee will explore the land and mine in a big way and pay a minimum royalty whether ore is mined or not, binds the lessee by covenant to explore and mine the property, and does not create a condition on which his right may continue or be defeated, for a "covenant" is a promise under seal to do or not to do a particular thing, while the office of a "condition" is generally to indicate the terms on which a certain right will arise or continue or be defeated. De Grasse v. Verona Mining Co., 152 N.W. 242, 246, 185 Mich. 514.

A "condition" as known in the law of realty is a qualification or restriction annexed to a conveyance of lands, whereby it is provided that, in case a particular event does not happen, or in case the grantor or grantee does, or omits to do, a particular act, an estate shall commence, be enlarged, or defeated. Where intention of parties to deed clearly shows that enjoyment of estate created by deed was intended to depend upon performance of agreement therein, agreement is a "condition" and not a "covenant," notwithstanding conditions are not favored. New Edgewood Lake Corporation v. Kingston Trust Co., 285 N.Y.S. 130, 134, 246 App.Div. 163.

A condition is a qualification or restriction annexed to a deed or devise, by means of which an estate is made, possessed, or to be enlarged or to be defeated upon the happening or not happening of a particular event, or the performance or nonperformance of a particular act. Words declaratory of the consideration for, and the purpose for, and the purpose of the conveyance and the limitation of, the use of the property, or which direct or prohibit the performance of a particular act, do not of themselves render an estate conditional. The same words may be employed to create a covenant as to create a condition, and, if there is any doubt regarding the intention of the grantor or devisor, courts will incline toward the former construction, for conditions which destroy estates are not favored and are strictly considered. A condition is always the creation of the grantor or devisor. A covenant may be made either by a grantor or the grantee. Detroit Union R. R. Depot & Station Co. v.

Cove . distinguished—Cont'd

Fort Street Union Depot Co., 87 N.W. 214, 216, 128 Mich. 184.

Plaintiff conveyed a strip of land for a railroad right of way on "condition" that the grantee "shall construct and maintain a * * * railroad to be operated by electricity for motive power, * * * and upon the failure or abandonment of said enterprise by the grantee * * * the privileges herein and the property hereby conveyed shall revert to and be fully vested in the grantors, * * * and conditioned also that the construction of such road be fully completed and such road be in operation in or before the year 1900." Held, that the clause requiring the road to be finished before or during the year 1900 was a "covenant" and not a "condition," and a failure to complete the road within that time did not operate as a forfeiture of the right of way. Krueger v. St. Louis, St. C. & W. R. Co., 84 S.W. 898, 901, 185 Mo. 227, citing Ellis v. Kyger, 3 S.W. 23, 90 Mo. 600; O'Brien v. Wagner, 7 S.W. 19, 94 Mo. 93, 4 Am.St.Rep. 362; Morrill v. Wabash, St. L. & P. Ry. Co., 9 S.W. 657, 96 Mo. 174; Studdard v. Wells, 25 S.W. 201, 120 Mo. 25; Roberts v. Crume, 73 S.W. 662, 173 Mo. loc. cit. 581; Gratz v. Highland Scenic R. Co., 65 S.W. 223, 165 Mo. 211.

See Covenant. Guerin v. Blair, Cal.App., 196 P.2d 651, 653, Subsequent opinion 204 P. 2d 884, 33 Cal.2d 744.

Creation and construction

"A condition is a qualification or restriction annexed to a conveyance. The words must not only be such as of themselves import a condition, but must be so connected with the grant in the deed as to qualify or restrain it." Laberee v. Carleton, 53 Me. 211, 213.

A condition in a deed, such as will work a forfeiture of the estate if not performed, is not favored in the law, and will not be implied. It will only be enforced where the language of the instrument containing it unmistakably imposes an estate on condition. Hamilton v. Kneeland, 1 Nev. 40, 53.

A devisee, accepting a devise, takes it subject to a condition therein stated; a condition meaning any qualification, restriction, or limitation annexed to the gift, and modifying or destroying conditionally its full en-

Creation and construction—Cont'd

joyment and disposal. In re Conway's Estate, 198 N.Y.S. 351, 120 Misc. 287.

Conditional estates are either estates upon condition in deed or upon conditions in law, the simplest form of an estate on condition in deed being where a grantor conveys the fee reserving a certain rent on condition that if it is not paid he or his heirs may re-enter. Sheets v. Vandalia R. Co., 127 N.E. 609, 610, 74 Ind.App. 597.

Where a note provided for attorney's fees if not paid promptly, the provision, "if not paid promptly," is not a "condition," within Burns' Ann.St.1914, § 9089, providing that all agreements to pay attorney's fees depending upon any condition set forth in any note, are illegal; the provision amounting to no more than providing for attorney's fees if the note was not paid at maturity. Easley v. Deer, 121 N.E. 542, 544, 65 Ind. App. 264.

No precise form of words is necessary in order to create a condition in a will, but, whenever it clearly appears that it was the testator's intention to make a condition, that condition will be carried into effect. Thus a legacy directed to be paid at the end of two years, provided that the legatee shall be deemed to be a reformed man in the judgment of the executors, is a conditional legacy. Markham v. Hufford, 82 N.W. 222, 223, 123 Mich. 505, 48 L.R.A. 580, 81 Am.St.Rep. 222.

The term "condition" in a conveyance to a church, on the express condition and limitation that it should not be sold, mortgaged or in any way conveyed, or any buildings kept, maintained, or erected thereon except for the purposes of the church, was held, in view of the fact, to receive a liberal construction for the benefit of the grantees, and not a construction tending to defeat the conveyance. Mills v. Davidson, 35 A. 1072, 1074, 54 N.J.Eq. 659, 35 L.R.A. 113, 55 Am. St.Rep. 594.

A condition may be created by express words, which is called a "condition in fact," as where a feoffment is made on land reserved, rent payable on a certain date, on "condition" that if not paid on the day the feoffer may re-enter. The law inclines to construe conditions as subsequent rather than precedent, and to be remedied by damages rather than by forfeiture. "Conditions subsequent," says Chancellor Kent, "are to

Creation and construction—Cont'd

be construed strictly, because they tend to destroy estates." Thornton v. Trammell, 39 Ga. 202, 207.

Under a mortgage in the form set out in St.1912, c. 502, § 6, further providing that, in case any default in condition should exist for more than 30 days, the entire mortgage debt should become due at the option of the holder, the word "condition" was applicable to the "statutory condition" requiring prompt payment of taxes; the parties having intended to include the additional agreement making the entire debt due in case of any default within the scope of the statutory condition. American House Hotel Co. v. Hemenway, 129 N.E. 371, 372, 237 Mass. 180.

Testator by his will gave certain estate to trustees to hold for the sole benefit of his grandchildren for three years, and at the expiration of that time to transfer the property to such grandchildren, adding, "If either of said children die before the trust ceases his or her legal heirs shall be substituted in place of the deceased in every respect." A granddaughter died within the three years, leaving a will by which she in terms gave her share of the property to her husband and others. The words of the will clearly enough created a conditional devise only. No particular set of technical words is necessary to create a condition; a common-sense construction of the words governs. The expressive word "if" is quite commonly employed to express a condition. The words "shall be substituted" have an unmistakable meaning in their place. It would be a perversion of the common meaning of common words to deny the testator's intention to create a conditional devise, and the happening of the subsequent condition defeats the precedent estate. Although a vested estate, therefore, nothing passed by her will. The husband of the devisee cannot be considered one of her legal heirs in the sense of the term as used in the devise over to "legal heirs." Buck v. Paine, 75 Me. 582, 588.

Defeasance

The words "condition", "defeasance", and "forfeiture" as applied to land, give rise to the same result, namely, that because thereof the person loses some right, title, interest or estate with which he was otherwise vested, but respecting the manner by which that re-

Defeasance—Cont'd

sult is reached, as well as procedurally, the words are distinct. Sturm v. Crowley, 48 S.E.2d 350, 352, 353, 131 W.Va. 505.

The words "condition", "defeasance" are similar in meaning and operate to defeat the force or operation of some deed or estate. Sturm v. Crowley, 48 S.E.2d 350, 352, 353, 131 W.Va. 505.

An instrument which defeats the force or operation of some other deed or of an estate is a "defeasance"; but, if the provision is in the same deed, it is a "condition." Epperson v. Epperson, 62 S.E. 344, 345, 108 Va. 471.

Where the conveyance of standing timber provided that the grantee should have and hold title thereto upon the "condition" and providing it was cut and removed from the land on or before a certain date, the estate was subject to defeasance on failure to cut the timber on such date. H. H. Hitt Lumber Co. v. Cullman Coal & Coke Co., 76 So. 347, 348, 200 Ala. 415.

Bouvier in his Law Dictionary defines "defeasance," as applied to contracts, to be an instrument which defeats the force or operation of some other deed or of an estate. That which is in the same deed is called a "condition"; and that which is in another deed is a "defeasance." Simmons v. West Virginia Ins. Co., 8 W.Va. 474, 486, citing Bouv.Law.Dict.

In a lease of premises to be used for hotel, saloon, and bathing purposes, which provides that, if the lessee shall use the premises contrary to the conditions therein contained, the lessor might re-enter, the continued use of the premises for saloon purposes is not a "condition," that being defined as a clause of contingency on the happening of which the estate may be defeated, and the lessor cannot re-enter for a breach thereof. Henry Rahr's Sons Co. v. Buckley, 150 N.W. 994, 995, 159 Wis. 589.

Directions

Courts will be reluctant to construe directions in an instrument creating a charitable trust as "conditions" unless such construction is manifestly appropriate. Pennebaker v. Pennebaker Home for Girls, 163 S.W.2d 53, 56, 291 Ky. 12.

If property is conveyed in trust for a charitable purpose, the mere fact that there

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is a direction in instrument of conveyance that property shall be used forever for such purpose, or that it shall be used for such purpose only, does not create a "condition". Pennebaker v. Pennebaker Home for Girls, 163 S.W.2d 53, 56, 291 Ky. 12.

A court will give that construction to the instrument creating a charitable trust which, from words used by donor in creating trust, it conceives to have been the intention of donor, and, if by determining from a fair construction of the writing that it was donor's intention that in all events the property was to be maintained for a charitable purpose, and that the manner of carrying out that purpose which is expressed in instrument was not the paramount object of trust, such directions will be construed to not be a "condition" for breach of which a reverter will occur. Pennebaker v. Pennebaker Home for Girls, 163 S.W.2d 53, 56, 291 Ky. 12.

Environment of premises

"Condition," as used in an insurance policy providing that the company shall not be liable if there be any omissions, misrepresentations, nondisclosure, or concealment of the condition of the premises, means more than location; it means location and environment. Fromhers v. Yankton Fire Ins. Co., 63 N.W. 784, 786, 7 S.D. 187.

Essential part of contract

The terms of a contract comprise "undertakings", which create obligations, and "conditions", which are contingencies on which the contract itself, or any particular obligation created by it, is to depend. General Am. Life Ins. Co. v. Armstrong, 185 S.W.2d 505, 507, 508, 182 Tenn. 181.

A provision in life policy that obligation to pay double indemnity for accidental death shall be void if total and permanent disability benefits are allowed was a "condition" rather than an "undertaking", and hence was not void as repugnant to unqualified undertaking to pay double indemnity. General Am. Life Ins. Co. v. Armstrong, 185 S.W.2d 505, 507, 508, 182 Tenn. 181.

"Condition" is created by mutual agreement of parties to conveyance, and is binding upon both. Moe v. Gier, 2 P.2d 852, 855, 116 Cal.App. 408.

Essenti rt of contract—Cont'd

In ... proper sense, the word "condition" in the law of contracts means ... operative fact subsequent to acceptance and prior to discharge, a fact on which the rights and duties of the parties depend; such a fact may be an act of one of the two contracting parties or the act of a third party, or any other fact. It is not necessary to constitute a "condition" that it be expressed in such. In re Oefein's Estate, 247 N.W. 108, 111, 209 Wis. 386.

In Franklin Fire Ins. Co. v. Chicago Ins. Co., 36 Md. 102, 11 Am.Rep. 469, the decision turned upon the meaning of the word "conditions" in a fire policy, and the court, following the suggestions in Blake v. Exchange Mut. Ins. Co., 78 Mass. (12 Gray) 265, confined it to those provisions of the policy which entered into and formed a part of the contract of insurance, and are essential to make it a binding contract between parties and which are properly designated as "conditions." Dwelling-House Ins. Co. v. Snyder, 34 A. 931, 932, 50 N.J.L. 18.

In its more extended sense, the word "condition" signifies a clause in a contract or agreement which has for its object the suspension, rescission, or modification of the principal obligation, or, in case of a will, to suspend, revoke, or modify the devise or bequest. Towle v. Remsen, 70 N.Y. 303, 307; Elyton Land Co. v. South & North Alabama R. Co., Ala., 14 So. 297, 298.

Code Civ.Proc. § 1187, providing that a claim of lien by an original contractor must contain a statement of his demand, less credits, the name of the owner, the name of the person by whom he was employed, a statement of the terms, time given, and conditions of the contract, and a description of the property to be charged with the lien, does not require that a claim of lien, to be valid, should set forth that the demand was based on more than one contract, and then segregate and separately state the amount of each, though the evidence in support of the lien showed that the work was performed on separate and distinct structures under separate and distinct contracts; the word "conditions" referring only to those provisions which enter into and form a part of the contract and are essential to make it binding. Acme Lumber Co. v. Wessling, 129 P. 167, 170, 19 Cal.App. 406.

Event or contingency

"Condition" denotes a future and uncertain event upon the happening of which is made to depend the existence of an obligation, or that which subordinates the existence of liability under a contract to a certain future event. Standard Surety & Casualty Co. v. Wynn, Tex.Civ.App., 172 S.W.2d 780, ref.

A "condition," as applied to a bond, is the expression of an event or contingency, upon the happening of which the obligation attaches. Ferguson v. Ferguson, Tex.Civ. App., 69 S.W.2d 592, 595.

"A 'condition' is a future and uncertain event upon which is made to depend the existence of a juridical tie or obligation, or rather it is a kind of restriction which subordinates the existence of a juridical relation to a future and uncertain event." Barber Asphalt Paving Co. v. St. Louis Cypress Co., 46 So. 193, 197, 121 La. 152, quoted and adopted from Dalloz Code Annoté Nouveau Code Civil, 111, p. 2, No. 27.

Depositors' guaranty law, Vernon's Ann. Civ.St. art. 447 note, providing "that deposits upon which interest is being paid or contracted to be paid, directly or indirectly * * * shall not be insured, * * *" held not to exclude a deposit which was to bear interest if left 12 months, but which depositor unsuccessfully attempted to withdraw before that time, and which had been in bank less than 12 months when it failed, "indirectly" signifying doing by obscure or circuitous means that which is prohibited from being done directly, a thing not done in direct or open manner, including all modes of doing prohibited act other than by direct method; "contingent" presaging the existence of a tentative liability which will become absolute on happening of certain event, and comprehending a liability depending on some uncertain future event, while "condition" denotes a future and uncertain event on the happening of which is made to depend the existence of an obligation, or which subordinates the existence of liability on contract to a future and uncertain event, and "if" being always expressive of a condition. Farmers' State Bank v. Mincher, Tex., 267 S.W. 996, 1001.

Franchise tax

The franchise tax imposed on corporations is not a "condition" or "qualification" to doing business. Hollingsworth & Whitney Co. v. State, 1 So.2d 387, 388, 241 Ala. 96.

Limitation of risk or liability

Automobile liability policy provision excluding garage operator from coverage was not a "condition". Mancini v. Thomas, 34 A.2d 106, 110, 113 Vt. 322.

On the question of effect of incontestability clause on suicide clause in policy, there can be no distinction in law or in reason between provision that upon certain conditions one-fifth only of face of life policy shall be payable, and provision that upon certain conditions the promise of the policy to pay face amount shall be void and premiums paid shall be returned, but in either case there is a "limitation of the liability" of insurer, not a "warranty" or "condition" upon breach of which liability assumed may be forfeited. New England Mut. Life Ins. Co. v. Mitchell, C.C.A.Va., 118 F.2d 414, 419.

The word "conditions," at least in American insurance parlance, is generally understood to mean more particularly the printed conditions on the inside of the policy which serve generally as a limitation of risk or of liability or impose various conditions requiring compliance by the insured. Federal Intermediate Credit Bank of Baltimore v. Globe & Rutgers Fire Ins. Co., D.C.Md., 7 F.Supp. 56, 68.

Occasion synonymous

Trial court's statement, that defendant's negligent act was the "occasion" rather than cause of plaintiff's injury, meant no more than that it was not a "proximate cause" of such occurrence; "occasion" being the equivalent of the term "condition". Edgecomb v. Great Atlantic & Pacific Tea Co., 18 A.2d 364, 365, 127 Conn. 488.

Person

Where insured did not have any medical knowledge and did not know at time of application or before issuance of life policy that he had cancer of stomach, insured's statement in good faith in application for policy that he had never had any ailment or disease of the stomach was a "representation" and not "warranty" or "condition", and hence under statute the policy was not subject to rescission because of such false statement. Metropolitan Life Ins. Co. v. Burno, 33 N.E.2d 519, 521, 309 Mass. 7.

Word "condition" within provision in insurance application warranting that applicant was in whole and sound condition means

Person—Cont'd

state or situation as regards internal or external circumstance or plight. Clark v. Commercial Casualty Ins. Co., 148 S.E. 319, 320, 107 W.Va. 380.

A warranty in an insurance application that applicant was in whole and sound condition, mentally and physically, is not breached by failure to state that he had a leg amputated at the knee, since "whole" means hale, hearty, strong, sound, and also entire, complete, and "sound" means hearty, not diseased, and also whole, unimpaired, and "condition" means state or situation as regards internal or external circumstance or plight, and that construction most favorable to assured will be taken. Great Eastern Casualty Co. v. Smith, Tex., 174 S.W. 687.

In prosecution for committing lewd act on 11 year old girl, exclusion of question asked accused's wife as to condition and demeanor of such girl and another girl after certain trip held prejudicial error. Pen. Code, § 288. Exclusion of such question was error because defendant was entitled to inquire into physical appearance or apparent mental attitude of girls on their return from trip when alleged offenses were committed, and inquiry as to "condition" of one girl and 'demeanor" of both related to physical appearance. People v. Vaughan, 21 P.2d 438, 131 Cal.App. 265.

In an action for physical pain, and for shame, humiliation, and suffering caused the plaintiff's wife from a conductor's abusive language to her, no element of the damages sued for was ignored by an instruction that the burden is upon the plaintiff to show by a preponderance of the evidence that she was injured and is suffering as alleged in the pleadings, and that "her said condition or her said injury and suffering are the direct and proximate result of the misconduct on the part of the defendant's conductor," and that if the jury should believe, by a preponderance of the evidence, that her "condition" resulted from some misconduct on the part of the conductor they should return a verdict in favor of defendant; the word "condition," as last used, in view of the other quoted phrases, comprehending every element of damage claimed in the petition, and clearly having reference to both her physical and mental condition. Carpenter v. Trinity & B. V. Ry. Co., Tex.Civ.App., 146 S.W. 363, 368.

Provisions

Provision in lease that if tenant defaulted in performance of any provisions therein and remained in default for 15 days after notice, then at the option of landlord, lease would terminate, in which event landlord could reenter and remove all persons from premises and that in such case tenant waived notice of landlord's intention to reenter, was a "condition" and on default of tenant, landlord's only remedy would be ejectment. Hayman v. Butler Bros., 82 N.Y.S.2d 148, 150, 196 Misc. 641.

Provision of sale contract for delivery of goods within reasonable time is "condition," which may be waived and, if waived, can not be reimposed without notice, but, if not waived, buyer may abrogate contract after expiration of such time without delivery. Readex Microprint Corp. v. General Aniline & Film Corp., 74 N.Y.S.2d 613, 618.

Generally, provisions in statutes authorizing actions for wrongful death which limit the time within which the actions shall be brought are "conditions" that must be strictly complied with. Peters v. Public Service Corporation, 29 A.2d 189, 194, 132 N.J.Eq. 500.

Provision that lease should terminate if no gas was being produced from the premises upon termination of the primary term, and that a gas well from which gas was not being sold or used off the premises was a producing well provided a specified royalty was paid, was a "condition". Freeman v. Magnolia Petroleum Co., 171 S.W.2d 339, 342, 141 Tex. 274.

Provision of accident and health policy that insurance shall not cover any person under age of 16 years or over age of 65 years constitutes a "condition" or "limitation" for benefit of insurer and not for benefit of insured, and is subject to waiver by insurer. Lipe v. World Ins. Co., 5 N.W.2d 93, 98, 142 Neb. 22.

In the absence of estoppel, waiver or other excuse, co-operation by the insured in accordance with the provisions of an automobile liability policy is a "condition" the breach of which ends insurer's obligation. Curran v. Connecticut Indemnity Co., 20 A.2d 87, 89, 127 Conn. 692.

Quoted words of oil and gas lease, requiring lessees to pay a specified royalty on

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Provis. —Cont'd

such gas well from which gas is not used off the premises and "while so paid" the well should be a "producing well" within provision that lease should remain in force as long as gas was produced from the land, were required to be construed with provision authorizing surrender of the lease, and extended the surrender privilege regardless of the royalty agreement and did not mean that such gas well could not be a producing well, if there should be a period of time after the primary term in which royalty was not paid, so as to make such provision a "condition." Freeman v. Magnolia Petroleum Co., Tex.Civ.App., 165 S.W.2d 111, 115, 116.

The term for which the accident policy was to run was one of the "conditions and provisions," within a clause to the effect that no "condition or provision" should be waived or altered by any one, unless by written consent of an officer of the company. Wheeler v. United States Casualty Co., 59 A. 347, 348, 71 N.J.L. 396.

Though words "provisions" and "conditions" may overlap in meaning in some contexts, as applied to contracts, "provisions" has the more general and "conditions" the more particular meaning. Equitable Life Assur. Soc. of United States v. Deem, C.C.A.W.Va., 91 F.2d 569, 573.

Standard mortgage clause which provides that failure to give notice of change of ownership will render fire policy void creates "condition" which, if breached, will defeat recovery on policy. Phoenix Mut. Life Ins. Co. v. Ætna Ins. Co., 59 S.W.2d 517, 519, 166 Tenn. 126.

The "provisions" of life policy relating to disability benefits include particular "conditions" on which such benefits become payable, but "provisions" affirmatively creating insurer's liability are not equivalent to "conditions," which limit and restrict such liability. Equitable Life Assur. Soc. of United States v. Deem, C.C.A.W.Va., 91 F.2d 569, 573.

The word "provision," as used in a policy insuring one subject to the "provisions, conditions, definitions and limits herein," indicates nothing technical, but is a general term which may include either a promise or undertaking of some kind or a condition. Blackman v. United States Casualty Co., 103 S.W. 784, 786, 117 Tenn. 578.

Provisions —Cont'd

Under statute requiring "exceptions" to policy to be printed with same prominence as benefits to which they apply, insurer could not rely on provision of life and accident policy specifying that indemnity should be paid only when death occurred within thirty days after accident, where provision conferring benefits was printed in bolder type, since such provision was not a "condition" but was an "exception." Smith-Hurd Stats. c. 73, § 363. Mowery v. Washington Nat. Ins. Co., 7 N.E.2d 334, 336, 289 Ill.App. 443.

Testatrix bequeathed the income of $30,000 to her niece for life, and, after her death, to her children, if any, absolutely, but, if she died without issue, the principal to go to two brothers named, the interest only for their use and to their children, lawful issue, absolutely. The will also contained a clause bequeathing the residue to the niece, subject to the same conditions as the legacy, the interest to be used for her benefit for life, the principal to go to her children, lawful issue, absolutely, but, if she died unmarried, she should have the power to devise it to whichever of her brothers she considered most worthy to inherit, the interest only to go to them, the principal to their children. The niece died without issue and without having exercised the power of appointment. Held, that the principal of the residue passed to the children, lawful issue, of the two brothers who took the $30,000 legacy absolutely; the word "conditions," as used in the residuary clause, being construed to mean the same as "provisions" under which the niece took the pecuniary legacy. In re Keene's Estate, 70 A. 706, 710, 221 Pa. 201.

Qualification synonymous

"Condition" is qualification annexed to estate by grantor upon happening of which estate granted is enlarged or defeated. Moe v. Gier, 2 P.2d 852, 855, 116 Cal.App. 403.

"Condition, in its legal signification, means something annexed to a grant." State v. Board of Public Works, 42 Ohio St. 607, 615.

A "condition" is a qualification annexed to an estate by the grantor upon the happening or breach of which the estate granted is enlarged or defeated. Anderson v. Palladine, 178 P. 553, 554, 39 Cal.App. 256.

A "condition" in a deed is a qualification of the estate granted, and may be either pre-

Qualification synonymous—Cont'd

cedent or subsequent. Nowak v. Dombrowski, 107 N.E. 807, 808, 267 Ill. 103.

"Conditions" are qualifications annexed by the lessor, whereby the estate granted may be enlarged, diminished, created, or defeated on the happening of some contingent event. Williams v. Notopolos, 103 A. 290, 291, 259 Pa. 469.

A condition is a qualification annexed to an estate on the happening of which the estate is enlarged or defeated, and it is created by mutual agreement of the parties and is binding on both so that breach of condition works forfeiture of estate. Joyce v. Krupp, 257 P. 124, 127, 83 Cal.App. 391.

A "condition" in the law of realty is a qualification or restriction annexed to a conveyance, providing that if an event does or does not happen, or the grantor or grantee does or omits to do a particular act, an estate shall commence, be enlarged, or defeated. Munro v. Syracuse, L. S. & N. R. Co., 93 N.E. 516, 518, 200 N.Y. 224, 21 Ann.Cas. 594.

A sublease, providing that it was made subject to conditions of original lease, which gave lessor option to terminate, did not incorporate provision of original lease for payment of all loss and damage; as a "condition" means a qualification or restriction annexed to a conveyance providing that in certain event an estate shall commence, be enlarged or defeated. Pedro v. Potter, 242 P. 926, 929, 197 Cal. 731, 42 A.L.R. 1165.

Supreme Court had no jurisdiction, since Code 1930, § 7-501, imposes upon right of appeal to Supreme Court, in actions for damages or money only, condition that amount in controversy shall exceed $250, and section 8-103 accords right of appeal from circuit court to Supreme Court in special statutory proceeding under "same conditions" as from judgment entered in action at law, a "condition" ordinarily being any qualification, restriction, or limitation modifying or destroying the full enjoyment or use of a right. Weir v. Marriott, 295 P. 449, 450, 135 Or. 214.

"Performing a condition" is doing of some act which is required to be done preliminary to vesting of some right or estate or obtaining of some benefit; "condition" is variously defined as a qualification, restriction, or limitation modifying or destroying the original act with which it is connected;

Qualification synonymous—Cont'd

a clause in a contract or agreement which has for its object to suspend, rescind, or modify the principal obligation, or in a case of a will, to suspend, revoke, or modify the devise or bequest; an event, fact, or the like that is necessary to the occurrence of some other, though not its cause; a prerequisite. White v. Harby, 179 S.E. 671, 178 S.C. 36.

"A condition is a qualification or restriction annexed to a conveyance of lands, whereby it is provided that in case a particular event does or does not happen, or in case the grantor or grantees do or omit to do a particular act, an estate shall commence, be enlarged, or be defeated." Heaston v. Randolph County Com'rs, 20 Ind. 396, 404; Johnson v. Gurley, 52 Tex. 222, 226; Thornton v. Trammell, 39 Ga. 202, 207; Laughley v. Ross, 20 N.W. 886, 887, 55 Mich. 164; Blanchard v. Detroit, L. & L. M. R. Co., 31 Mich. 43, 49, 18 Am.Rep. 142; Michigan State Bank v. Hastings, Mich., 1 Doug. 224, 232, 41 Am.Dec. 549; Campau v. Chene, 1 Mich. (Man.) 400, 413; Detroit Union R. Depot & Station Co. v. Fort Street Union Depot Co., 87 N.W. 214, 216, 128 Mich. 184; Warner v. Bennett, 31 Conn. 468, 475; Fowlkes v. Wagoner, Tenn., 46 S.W. 586, 591; Williamson v. Gordon Heights Ry. Co., Ind., 40 A. 933, 934; Smith v. White, 5 Neb. 402, 407; Rogan v. Walker, 1 Wis. 527, 554; Raley v. Umatilla County, 13 P. 890, 894, 15 Or. 172, 3 Am.St.Rep. 142. The condition which is to affect the estate may be express or implied, and it may be precedent or subsequent. Raley v. Umatilla County, 13 P. 890, 894, 15 Or. 172, 3 Am.St.Rep. 142; Michigan State Bank v. Hastings, Mich., 1 Doug. 224, 232, 41 Am.Dec. 549, citing Litt. § 325. "The condition is annexed to the estate; it doth always attend and wait upon the estate it is knit to it." If it would not be competent for an individual to separate an estate from the condition annexed to it, it would not be competent for the state to do it. Michigan State Bank v. Hastings, Mich., 1 Doug. 224, 206, 41 Am.Dec. 549. A condition must be reserved by words used by the grantor, but it is not necessarily confined to the covenants of the deed. So where the recital of a deed was not a mere recital of past circumstances but a declaration of present intention and a part of the original contract of the parties, and declared that the conveyance was "on this condition"—that is, that the grantee

Qualification synonymous—Cont'd

should discharge a certain ground rent, and also build a house on such land for the use of the grantor—the condition was effectually reserved, in addition to the security afforded by covenants in other parts of the deed. Hamilton v. Elliott, Pa., 5 Serg. & R. 375, 381.

Quality

A "condition" is a quality annexed to land whereby an estate may be divided. Littlejohn v. Egerton, 77 N.C. 379, 384.

Regulations distinguished

Const. art. 11, § 19, as amended in 1911, see Laws 1911, p. 2180, authorizing any municipal corporation to establish and operate enumerated public utilities, and providing that persons or corporations may establish and operate such works under "such conditions and under such regulations as the municipality may prescribe under its organic law, on condition that the municipal government shall have the right to regulate the charges thereof," grants to all municipalities the power to construct and operate public utilities, and to prescribe the conditions on which persons and corporations may establish and operate such works, subject to charter provisions; and an ordinance of a city empowered to regulate conduits and works for the production and distribution of gas, etc., which prohibits excavations in streets without first obtaining permission from the board of public works, is valid when applied to one engaged in laying a gas pipe in a street as a part of the distributing system of a corporation engaged in supplying gas to the inhabitants of the city; the word "condition" meaning something established as a requisite to the doing or taking effect of something else, while the word "regulations" is something distinct from the word "conditions," and implies a broader meaning in the latter word than mere regulation of the manner of use. Ex parte Russell, 126 P. 875, 876, 163 Cal. 668.

Restraint on alienation distinguished

"Condition" in deed refers to case where on breach of restraint land is forfeited to grantor or his heirs on entry, and is distinguished from mere restraint on alienation. White v. White, 150 S.E. 531, 533, 108 W.Va. 125, 66 A.L.R. 518.

Restriction

"Statutes of limitation" in a strict sense, are statutes of repose, and are such legislative enactments as prescribe the periods within which actions may be brought upon certain claims or within which certain rights may be enforced, but statutes which merely restrict a statutory or other right are in the nature of "conditions" put by the law upon the right given. Ritter v. Franklin, 123 P.2d 866, 869, 50 Cal.App.2d 844.

A "condition" is a qualification or restriction annexed to a conveyance, and so united with it in the deed as to qualify it or restrain it. Cooper v. Green, 28 Ark. 48, 54.

A "condition" is any qualification, restriction, or limitation annexed to a gift, and modifying or destroying its full enjoyment. Adams v. Johnson, 76 A. 174, 227 Pa. 454.

A provision in a will that real estate which had therein been devised in fee should not be sold or alienated by the devisees for a certain number of years is properly a restriction, though called in the will a "condition." Fowler v. Duhme, 42 N.E. 623, 633, 143 Ind. 248.

The words "and these presents are upon this condition," namely, that the lessee shall suffer the lessor to enjoy a way reserved through the demised premises without obstruction, are sufficient in a durable lease to make the estate a conditional one without an express clause of re-entry, and, if the way be obstructed, ejectment lies. Jackson v. Allen, N.Y., 3 Cow. 220, 225.

The word "conditions," as used in Acts Cong. April 14, 1802, 2 Stat. 153, and May 26, 1824, 4 Stat. 69, providing that an alien may be admitted to become a citizen on the "following conditions, and not otherwise," and specifying the proceeding for naturalization, cannot be held to mean that the applicant shall see to it that the proceedings are recorded. The conditions are well satisfied by limiting them to what the applicant is required to do in so far as his acts are concerned. In re Coleman, C.C.N.Y., Fed.Cas. No.2,980, 15 Blatchf. 406.

The word "condition," in statutes restricting effect of breach of condition in avoiding insurance policy, includes fire policy condition that insured must have fee-simple title to land involved, and other conditions precedent, and hence statute prevents avoidance of policy unless breach has caused

Restriction—Cont'd

increase of moral or physical hazard. Brough v. Presidential Fire & Marine Ins. Co., La.App., 176 So. 895, 900.

In an ordinance, granting to an electric company the "right to manufacture and vend" electricity to the city and the citizens, "subject to the provisions and conditions hereinafter contained," which conditions were to furnish certain lights and not to erect an ice plant on a certain lot, it was not a "condition" that the company "manufacture" its own electricity rather than purchase it from another, since the grant should be construed according to Vernon's Ann.Civ.St. art. 10, providing that the ordinary signification should be applied to words not technical, and since a condition ordinarily is any qualification, restriction, or limitation modifying or destroying the full enjoyment or use of a right, and under the maxim that the "expression of one thing is the exclusion of another," the word "manufacture" cannot be construed as more than mere description of the extent of the permit. City of Terrell v. Terrell Electric Light Co., Tex., 187 S.W. 966, 967.

Restriction distinguished

Where a deed clearly shows the intention of the parties that on breach of a restriction the estate should be defeated and returned to the grantor, the restriction is a "condition," whether the apt words to create a condition are used or not. Ball v. Milliken, 76 A. 789, 791, 31 R.I. 36, 37 L.R.A., N.S., 623, Ann.Cas.1912B, 30.

The word "restrictions," when used in connection with the grant of an interest in real property, is the equivalent of "conditions," and either term may be used to denote a limitation upon the full and unqualified enjoyment of the right or estate granted. The word "restrictions," in Pub.St. c. 113, § 7, providing for the location of street railways, subject to such restrictions as required by public interest, is the equivalent of "conditions," and therefore limitations may be imposed on the enjoyment of the right to use the streets granted for such purposes. Blodgett v. Worcester Consol. St. Ry. Co., Mass., 78 N.E. 222, 224, citing Skinner v. Shephard, 130 Mass. 180; Ayling v. Kramer, 133 Mass. 12; Clapp v. Wilder, 57 N.E. 692, 176 Mass. 332, 50 L.R.A. 120.

Terms

"Conditions," as used in a deed reciting that "this conveyance is made to the parties, their heirs and assigns, absolute and in fee simple with and on the following conditions," is used in its generic sense "to denote the predicament or status of the title, its condition, and, where a subsequent portion of the deed shows that the grantor only owned an equity of redemption in the land, the deed will not be considered as passing a fee simple." Dunlap v. Mobley, 71 Ala. 102, 105.

Under Const. art. 18, § 7, providing for the enactment of the Employers' Liability Law contained in Civ.Code 1913, para. 3154-3158, and its provisions making the employer liable for the death or injury of employee caused by any accident due to conditions of a hazardous occupation, the employer is liable when the injury is caused by an accident due to conditions of the employment, which conditions need not be inherent in the occupation, but may arise from the manner in which the business is carried on, the word "hazardous" being defined as "exposed to; exposing to; or involving danger; risk of loss or calamity; perilous; risky;" and the word "condition" being defined as "mode or state of being; state or situation with regard to external circumstances; essential quality; property; attribute." Consolidated Arizona Smelting Co. v. Egich, 199 P. 132, 134, 22 Ariz. 543.

Terms

Under statute requiring that conditional sales contract shall describe "all conditions of such sale", the terms of conditional sale, performance or nonperformance of which determines whether title shall be in vendee or vendor, constitute a "condition" in commonly accepted meaning of the word, and hence include provisions for payment at a certain date, failure to make which would end estate of the vendee. Standard Acceptance Corporation v. Connor, 15 A.2d 314, 316, 127 Conn. 199, 130 A.L.R. 720.

In an order granting a new trial on condition that the party pay all costs, the word "condition" is used as synonymous with the word "terms," and so does not render the order invalid as conditional. Galveston, H. & S. A. Ry. Co. v. Borden, Tex., 29 S.W. 1100, 1101.

Securities Act requiring brokers' bonds containing specified conditions, "with terms

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Terms—Cont'd

and in form to be approved by Secretary of State," held attempted unconstitutional delegation of authority; "terms" being synonymous with "conditions". Smith-Hurd Stats. c. 121½, § 118. People v. J. O. Beekman & Co., 179 N.E. 435, 437, 347 Ill. 92.

An allegation that plaintiff duly performed all the terms and obligations in a contract of employment on his part until a stated date held not a sufficient compliance with Rules of Civil Practice, rule 92, authorizing the pleading of a condition precedent in a contract by stating in general terms that the party in question duly performed all the conditions of such contract on his part, as due performance of the "terms and obligations" of the contract is not synonymous with "conditions." Berger v. Urban Motion Picture Industries, 201 N.Y.S. 489, 491, 206 App.Div. 379.

That the statute in force prior to Code 1906, § 800, providing that every new trial granted shall be on such "terms" as the court shall direct, read "terms and conditions," is immaterial, as the words are synonymous; "terms" meaning porpositions, limitations, or provisions stated or offered, and a "condition" is that which limits or modifies the existence or character of something; a restriction or qualification. Yazoo & M. V. R. Co. v. Scott, 67 So. 491, 495, 108 Miss. 871, L.R.A.1915E, 239, Ann.Cas.1917E, 880.

An order granting a new trial and directing the party to whom it was granted to pay witness fees as a "condition" upon which such new trial was granted, means that the payment of the fees was the terms on which the order was made, and not a condition on the performance of which it should take effect. In this connection the court says: "If the word 'condition' had no other meaning except that in which it is used in the law of conveyances, we might be constrained to hold that the order granting a new trial was to take effect only upon the contingency that the defendant should pay the costs, but such is not the fact. Among other definitions, Worcester gives its meaning as 'something to be done,' and in that sense, when plural, it is synonymous with 'terms.'" Fenn v. Gulf, C. & S. F. Ry. Co., 13 S.W. 273, 76 Tex. 380.

Where, pending the submission to arbitration of a controversy as to the ownership

Terms—Cont'd

of a tract of land known as the "Poke Run Place," the parties entered into an agreement whereby they "agreed that the contest as to the Poke Run Place be given up 'on condition' that Mr. Rugh shall in a reasonable time convey to Jacob Haymaker's three daughters the whole of the Poke Run Place by deed in fee simple, and, on said Rugh's doing so, said Haymaker quits all claims to said place," the word "condition" was obviously employed to express the same as "term of the agreement," as if it had read, "It is agreed that the contest be given up on the terms following," etc., and the agreement should be construed not as conditional, but absolute. Meanor v. McKowan, Pa., 4 Watts & S. 302, 305.

A resolution adopted by a city council pending a dispute with a street railroad company as to its franchise rights with respect to fares, etc., on certain streets, which permitted the company to continue operations from time to time "upon the same terms and conditions now prevailing in the city, whether due to contract agreement or not," though made when the city knew that the company was collecting extra fares on certain lines which were without the city limits when the franchises for such lines, which authorized extra fares, were granted, did not recognize the company's right to charge extra fares on such lines; the word "prevailing" having no technical meaning and as used signifying that which is common, in operation, or prevalent, while the words "terms" and "conditions" mean the propositions and limitations which comprise the agreement and govern the parties, defining their obligations, and, as applied to an ordinance giving a franchise, signifying the boundary limit or extent of the grant. City of Detroit v. Detroit United Ry., 139 N.W. 56, 59, 173 Mich. 314.

Trust created or implied

A grant of land to the bishop of a church, upon "condition" that it shall be forever held for the use of a certain church, does not necessarily create a technical estate on condition, so that the estate shall be revertible, but means simply that the estate is to be held in trust for the purpose named. The use of the term "condition" does not necessarily import the creation of a conditional estate but "condition" may

ist created or implied—Cont'd

mean "trust," and vice versa. Neely v. Hoskins, 24 A. 882, 883, 84 Me. 386.

The word "condition" is a term of flexible meaning. In leases it is often construed as a covenant. Express words of condition shall be taken for a limitation, if the nature of the case requires it. Words of express condition are not inapt as introductory to a declaration of trust. Every conveyance to a charitable use is a conveyance to hold upon the trust declared, and the execution of the trust is a "condition" upon which the estate is taken and held, to be given effect to, not by forfeiture of the title, but by those methods by means of which a court of equity compels the performance of such trusts. So, where a conveyance of a lot of land was made to a church and to their successors, but not to their assigns, with a habendum in these words, "To have and to hold unto the said party of the second part upon this express condition and limitation, that neither of said parties or their successors shall at any time sell, mortgage or in any way convey the said lands and premises," etc., it was held that the grant did not create a condition for the breach of which the grantors might enter as for a forfeiture of the estate, but created a trust, which the grantee taking the legal estate was bound to perform. Mills v. Davison, 35 A. 1072, 1075, 54 N.J.Eq. 659, 35 L.R.A. 113, 55 Am.St.Rep. 594.

Warranties

Where insured, in written application for reinstatement of lapsed life policy, stated that, for purpose of inducing insurer to reinstate policy, insured declared that he was in sound health and within the past two years had had no disease, injury, or impairment of health and had not consulted nor been treated by a physician, the insured's statement was a "representation," rather than a "warranty" or "condition," and the representation was not part of the contract. Sommer v. Guardian Life Ins. Co. of America, 24 N.E.2d 308, 311, 281 N.Y. 508.

A "warranty" can only exist where subject matter of sale is ascertained and existing, so as to be capable of being inspected at time of contract, but where subject matter is not in existence, or not ascertained, an engagement that it shall, when existing or ascertained, possess certain qualities, is not a mere "warranty" but a "condition," performance of which is precedent to any obligation upon buyer under contract, since existence of these qualities, being part of description of thing sold, becomes essential to its identification, and buyer cannot be obliged to receive and pay for a thing different than that for which he contracted. Chiquita Mining Co. v. Fairbanks, Morse & Co., 104 P. 2d 191, 195, 60 Nev. 142.

Warranties—Cont'd

In insurance law the terms "warranty" and "conditions" are often used interchangeably. Mutual Life Ins. Co. of New York v. Mandelbaum, 92 So. 440, 441, 207 Ala. 234, 29 A.L.R. 649.

In a contract for sale of storage battery equipments for street cars, which provided that the plant shall be considered satisfactory if it fulfills the "following conditions," it was held that the "conditions" did not mean merely conditions upon which the vendee might compel the acceptance of the equipment, but were warranties for the breach of which damages might be recovered. Accumulator Co. v. Dubuque St. Ry. Co., Iowa, 64 F. 70, 77, 12 C.C.A. 37.

Under Vernon's Ann.Civ.St. art. 4235, providing no breach by insured of a warranty or condition of a fire policy shall void it unless contributing to bring about destruction of the property, the owners of household goods, in storage, and insured against fire while on the particular premises, and not elsewhere, could recover for their destruction in premises to which the warehousemen removed the goods; such removal by insured through their agents being a breach of "condition," and not having caused the loss. Allemania Fire Ins. Co. v. Angel, Tex., 214 S.W. 450, 451.

In American Popular Life Ins. Co. v. Day, 39 N.J.L.(10 Vroom) 89, 23 Am.Rep. 198, in our court of last resort, "warranties" and "conditions" in insurance policies are treated as synonymous terms, as indeed they are. In Sonneborn v. Manufacturers' Ins. Co., 44 N.J.L.(15 Vroom) 220, 43 Am.Rep. 365, it was declared in the same court that a promissory warranty had the nature of a condition precedent. That every inducing statement made a warranty by a policy of life insurance shall be true is plainly a condition precedent to the insurer's liability under such policy. In Eddy Street Iron Foundry v. Hampden Stock & Mut. Fire Ins. Co., 8 Fed.Cas. 300, Clifford,

Warranties—Cont'd

the vendor to deliver an article of a specified quality or description, or out of a breach of representation which is material to the contract, or out of such a breach when the representation or warranty is implied instead of express. In either case there is an agreement, in substance and purport, to the same effect; in either, a breach of it works the same injury to the vendee; whether the cause of action is for a breach of contract or for the breach of a warranty is a mere matter of nomenclature. Cleveland Linseed Oil Co. v. A. F. Buchanan & Sons, N.Y., 120 F. 906, 908, 57 C.C.A. 498, citing Bagley v. Cleveland Rolling Mills Co., C.C.N.Y., 21 F. 159.

See Warranty. Shinn v. Family Reserve Ins. Co., 33 So.2d 741, 742, 33 Ala.App. 281.

Wealth

The word "condition," in an instruction in an action for libel that in estimating damages the jury are to consider plaintiff's injured feelings and tarnished reputation, taking into account the nature of the imputation, extent of its publication, the character, "condition," and influence of the parties, and all the surrounding circumstances, refers rather to social standing than to wealth, for it would not be the legitimate and natural construction of the word to consider it as meaning wealth. Buckstaff v. Hicks, 68 N.W. 403, 404, 94 Wis. 34, 59 Am.St.Rep. 853.

CONDITIONAL

Cross References

Fee Conditional

Unconditional; Unconditionally

Where will making bequests to charities contained provision revoking bequests in absence of express consent in writing of testator's widow, and widow gave consent within time limited by will, bequests were so "conditional" as to preclude deduction under statute authorizing a deduction for estate tax purposes of gifts to corporations organized for religious, charitable, scientific and educational purposes, as against contention that bequests vested at time of testator's death on theory that when widow gave her consent her act related back to time of testator's death. First Trust Co. of St. Paul v. Reynolds, D.C.Minn., 46 F.Supp. 497, 502.

WORDS AND PHRASES

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on with current or private owners of land across ch easement is sought. MacCaskill v. Ebbert, , 739 P.2d 414, 418, 112 Idaho 1115.

IDEMNATION AWARD

mount received for unlawful appropriation of was award of "damages" and not "condemna- award" within agreement providing that one should receive 30% of any award for damages sh paid in settlement of claim for such appro- on, but that 30% provision applied only to ges and not to condemnation award. Proser v. r, Fla.App., 132 So.2d 439, 442.

DEMNATION BLIGHT

constitute "Condemnation Blight" there must ome evidence that competent authority having ction asserted control or threatened to con- the property. In re Searingtown Road, Town th Hempstead, Nassau County, 326 N.Y.S.2d 9, 68 Misc.2d 405.

idemnation blight" relates to impact of cer- s upon value of the subject property; it in no ports a taking in the constitutional sense, but permits a more realistic valuation of con- property in subsequent de jure proceeding; such case, compensation shall be based on property at time of the taking as if it had n subjected to the debilitating effect of a ed condemnation. City of Buffalo v. J. W. Co., 269 N.E.2d 895, 903, 28 N.Y.2d 241, S.2d 345.

MNATION BY PUBLIC AUTHORITIES

"condemnation by public authorities" in viding that if leased premises are damaged condemnation by public authorities," storm, act of God, unavoidable accident, or public extent not rendering them untenantable, lord shall restore and rent shall not abate, if premises are injured by any of those as to be partially untenantable, landlord re and rent shall abate proportionately, if premises are injured by any of those as to be wholly untenantable, lease shall id did not include condemnation by emi- ain, and tenant had right to share in ion award in eminent domain proceeding. lothes, Inc. v. Fleet, 184 A.2d 731, 734, 5?

ATION IN REVERSE

nation in reverse" principle rests on aking, destroying, or injuring of property without any color of right or title to do Dept. of Highways v. Davidson, Ky., 383 348.

ghway department took part of farm by by mistake performed construction, contractor, on strip which was not in- deed, there was condemnation proceed- e, or what is sometimes called "condem- erse", and proper forum for court action ity where land lay. Com., Dept. of Gisborne, Ky., 391 S.W.2d 714, 716.

CONDEMNATION PROCEEDINGS

See, also, Statutory Condemnation Proceedings.

In general

City's acquisition of transportation company's property under terms and conditions of franchise agreement was not a "condemnation proceeding." Application of City & County of Honolulu Corporation Counsel, Hawaii, 507 P.2d 169, 171.

By filing petition asking that commissioners be appointed to determine just compensation for land taken, highway commissioner instituted "condemnation proceedings" and court should have allowed interest on excess, if any, of award, as finally approved by court, over certified amount computed to date of order confirming, altering or modifying commissioners' award or, if later, to date of payment into court. Whitworth v. State Highway Commissioner, Va., 161 S.E.2d 698, 702, 209 Va. 95.

CONDEMNATIONS EFFECTED

"Condemnations effected" within meaning of section of Eminent Domain Code providing that it shall apply to all condemnations effected after September 1, 1964, means actual undertaking of work and not merely filing of a grade change plan. Pane v. Com., Dept. of Highways, 222 A.2d 913, 917, 422 Pa. 489.

CONDEMNEE

Tenant is a "condemnee" within meaning of statute providing that when tenant's leasehold interest is taken, injured or destroyed, tenant is entitled to just compensation. In re Com., Dept. of Transp., 447 A.2d 342, 344, 67 Pa.Cmwlth. 318.

Lessee of property purchased by municipal authority is not entitled, after termination of lease, to status of "condemnee" under Eminent Domain Code. Appeal of Radio Broadcasting Co., 55 Pa. Cmwlth. 147, 423 A.2d 444, 450.

Word "condemnee," within eminent domain code permitting a condemnee to express an opinion regarding value of property in an eminent domain proceeding, includes any party with an interest in property and, hence, includes a mere lessee. Baldassari v. Baldassari, 420 A.2d 556, 560, 278 Pa.Super. 312.

Where condemning authority purchased rental property from landlord, entered into six-month lease with commercial tenants, and thereafter allowed such six-month lease to expire by its terms, giving due notice to tenants, tenants were neither "condemnees" nor "displaced persons," and were therefore entitled neither to compensation for taking of their leasehold interest nor to moving and related expenses of displaced persons. Hindsley v. Lower Merion Tp., 360 A.2d 297, 298, 25 Pa.Cmwlth. 455.

Owners of property which abutted proposed site of transmission line, but whose land was not subject of condemnation action, were not "condemnees" within meaning of statute which sets forth conditions under which attorney fees and expert witness fees are to be awarded to condemnees, despite property owners' contention that they were inverse condemnees as result of aesthetic damage to their property. Public Utility Dist. No. 1 v. Kottsick, 545 P.2d 1, 4, 86 Wash.2d 388.

Lessee who operated miniature golf course on property that was taken in eminent domain proceeding was a "condemnee" within meaning of eminent domain statute allowing condemnee to testify without further qualification as to just compensation, and he could testify as to reproduction costs as an element in his valuation of his interest. Hoffman v. Com., 221 A.2d 315, 319, 422 Pa. 144.

CONDEMNER

The term "condemner," as used in statute providing for award of reasonable attorney fees if action is abandoned by condemner, means person who brought the condemnation proceedings, whether he was qualified to do so or was either within the definition of a condemner but for some reason disqualified from bringing condemnation action in particular case or did not qualify as a condemner under the definitional statute. Braat v. Andrews, 514 P.2d 540, 542, 266 Or. 537.

CONDEMNING BODY

Georgia Ports Authority is not a "condemning body" within chapter relating to condemnation before special master and defining condemning body as state or any branch of government of state or political subdivision of state and authority was not authorized to exercise power of eminent domain under the act. Scarlett v. Georgia Ports Authority, 156 S.E.2d 77, 78, 223 Ga. 417.

CONDEMNOR'S PROOF

"Condemnor's proof" was State's initial offer within meaning of statute permitting award of actual and necessary costs, disbursements, and expenses incurred by landowner if award is substantially in excess of condemnor's proof. Long Island Pine Barrens Water Corp. v. State, N.Y.Ct.Cl., 544 N.Y. S.2d 939, 940.

CONDITION

See, also,

Accepted in its Present Condition.
Apparent Good Condition.
Artificial Condition.
Acute Manifestation of Chronic Condition.
Change in Knowledge or Conditions.
Change of Conditions.
Change of Conditions Affecting Neighborhood.
Changing Conditions.
Circumstances and Conditions.
Concurrent Conditions.
Constructive Condition.
Covenant or Condition.
Destitute Condition.
Disease Condition.
Dormant Non-Disabling Disease Conditions.
Employment Condition.
Estate on Condition.
Extrahazardous Condition.
Extraordinary Conditions.
General Covenant or Condition.
Habitable Condition.
Handicapping Conditions.
Impaired Condition.
Impairment of Physical Condition.
Impossible Condition.
Improved in Condition.
In Apparent Good Order and Condition.
In its Present Condition.
Injuries or Conditions.
Lawful Condition.

Material Change in Conditions and Circumstances.
Natural and Ordinary Conditions.
Normal operating conditions.
On Same Terms And Conditions.
Operable Condition.
Original Condition.
Other Existing Conditions.
Other Condition.
Paranoid Condition.
Poor Condition.
Potestative Condition.
Pre-Existing Condition.
Problems or Conditions.
Promissory Condition.
Purely Potestative Suspensive Condition.
Put In Good Condition.
Record of Act, Condition or Event.
Resolutive Condition.
Restored to Same Condition.
Safe Condition.
Safe Mechanical Condition.
Simple Potestative Condition.
Social Condition.
Some Exceptional Condition.
Special Term And Condition.
Subsidiary Condition.
Such Other Conditions.
Terminal Condition.
Terms and Conditions.
Terms and Conditions of Labor.
Then Condition.
Unconstitutional Conditions.
Under the Same Terms and Conditions.
Unforeseeable Condition or Hardship.
Unreasonably Dangerous Condition.
Unsanitary Conditions.
Without Condition or Reservation.
Without Respect to Future Changes in Conditions.
Work Conditions.
Worsened Conditions.

In general

For purpose of determining whether known or obvious danger rule relieved swimming pool manufacturers and landowners from liability to man paralyzed in diving accident for failure to warn of shallowness of pool, water of unknown depth was a known "condition." Griebler v. Doughboy Recreational, Inc., Wis.App., 449 N.W.2d 61, 64.

Situation in which rocks were thrown at automobiles by unknown persons standing on bridge over the highway was a "condition" for purposes of statutory waiver of sovereign immunity for damages caused by dangerous condition of Commonwealth real estate. Mistecka v. Com., 408 A.2d 159, 162, 46 Pa.Cmwlth. 267.

The physical condition of a motor vehicle is a "condition" contemplated by statute prohibiting operating of a motor vehicle at a speed greater than is reasonable or proper, having due regard to the traffic, surface and width of the street or highway and any other conditions. State v. Saffell, 337 N.E.2d 622, 624, 44 Ohio St.2d 39, 73 O.O.2d 228.

Car dealer's representation of vehicle as an executive demonstrator when in fact vehicle was previously owned by an automobile leasing company did not constitute a misrepresentation as to "condition" of automobile within statute authorizing license suspension for such misrepresentation. Fitzpatrick's Inc. v. Commissioner of Motor Vehicles, 334 A.2d 476, 478, 165 Conn. 416.

The term "condition," in State Tort Claims Act provision imposing liability, inter alia, as to claim arising from condition of traffic control signal which has not been corrected by governmental unit responsible within reasonable time after notice has been given to such unit, referred to either an intentional or inadvertent state of being. Sparkman v. Maxwell, Tex., 519 S.W.2d 852, 857.

Obstruction of traffic sign by trees or bushes is "condition" of such sign, exposing municipality to liability under Tort Claims Act for negligent failure to keep view of sign unobstructed. Kenneally v. Thurn, Tex.App. 4 Dist., 653 S.W.2d 69, 72.

Lack of virginity is not "condition" under exception to rape shield law permitting admission of "evidence of recent conduct of the victim alleged to be the cause of any physical feature, characteristic, or condition of the victim." Com. v. Elder, 452 N.E.2d 1104, 1111, 389 Mass. 743.

Term "condition" as it is used in the statute for grant of permits by Pollution Control Agency is different from term "person" and PCA exceeded authority by naming parent corporations as additional parties to permit allowing taconite company to drain water from taconite pit into city storm sewer system as a condition of the permit. Matter of Hibbing Taconite Co., Minn.App., 431 N.W.2d 885, 890.

Failure to warn travelling public of obstruction placed on highway by a person in a manner such as to constitute negligence is "continuing negligence" as distinguished from "condition." Looney v. Pickering, 439 N.W.2d 467, 472, 232 Neb. 32.

Standard comprehensive general liability policy issued to association of steamship, stevedore, and terminal companies and which provided coverage for "accident" and "condition" resulting in bodily injury did not provide coverage for intentional discrimination in hiring. Industrial Indem. Co. v. Pacific Maritime Ass'n, 777 P.2d 1385, 1388, 97 Or.App. 676.

Spondylolisthesis constitutes a "condition" within meaning of statute governing apportionment of liability for permanent disability between an employer and the Special Fund where a preexisting dormant condition is aroused into disabling reality by a subsequent injury or occupational disease; thus, where employee, who injured his back in work-connected accident, sustained a 20% permanent disability, one-half of which was attributed to arousal of the preexisting dormant spondylolisthesis, employer was required to bear responsibility for payment of 10% partial disability while the Special Fund bore ultimate responsibility for the remaining 10% disability. Yocom v. Gibbs, Ky., 525 S.W.2d 744, 746.

In statute providing that each governmental unit shall be liable for money damages for personal injuries or death caused from some condition or use of tangible property but that such statutory liability shall not apply to absence, condition or malfunction of any traffic or road sign unless such absence, condition or malfunction is not corrected by governmental unit responsible within reasonable time after notice, word "condition" was not intended to refer to state's installation or maintenance of sign or signal insofar as ease of its removal by thieves was concerned but rather to maintenance of sign or signal in condition sufficiently to perform its intended function. Lawson v. McDonald's Estate, Tex. Civ.App., 524 S.W.2d 351, 355.

A "condition" is something established or agreed upon as a requisite to the doing or taking effect of something else. State v. Community Distributors, Inc., 304 A.2d 213, 218, 123 N.J.Super. 589.

Exclusion clause providing that aircraft policy did not apply to any damage occurring while aircraft was operated in flight by other than pilot or pilots described separately in the declarations did not constitute either a "warranty" or a "condition" within meaning of statute providing that breach of a warranty or condition in any contract or policy of insurance shall not avoid the policy or avail insurer to avoid liability unless such breach exists at time of loss and contributes to the loss. Omaha Sky Divers Parachute Club, Inc., v. Ranger Ins. Co., 204 N.W.2d 162, 164, 189 Neb. 610.

Term "condition" within lease permitting lessee to cancel lease if any law, decision, regulation or condition should exist making it unprofitable for lessee to carry on its business was not restricted to a condition of the same general character as a law, decision or regulation and lessee could cancel lease on ground that it had lost receivables, prime rate of interest had increased, it had suffered several armed robberies and customers were reluctant to do business in area of lease premises. S & H Realty & Inv. Co. v. Consumers Budget Loan Co., 289 N.E.2d 696, 698, 8 Ill.App.3d 206.

Stop sign's obstruction from view by trees or branches is "condition" of such sign within meaning of State Torts Claims Act provision permitting claim against city arising from absence, condition or malfunction of traffic or road sign. Lorig v. City of Mission, Tex., 629 S.W.2d 699, 701.

For purpose of rule that for a material breach of contract that is not a failure to satisfy a condition of a licensing agreement, a copyright licensor has only cause of action for breach of contract, a "condition" is any fact or event which qualifies a duty to perform. Costello Pub. Co. v. Rotelle, C.A., 670 F.2d 1035, 1045, 216 U.S.App.D.C. 216.

Proof of child's being found naked, unattended and unwashed on a date prior to time child was removed from custody of natural mother was not proof of "conditions" for failure of which to rectify mother was to suffer severance of her parental relationship since the mother could not dress, wash and attend to the child and thus rectify the conditions after he had been removed from her custody, and the conditions were not of a continuing character because the incident, though indicating negligence, was isolated. R. L. L. v. Strait, Mo.App., 633 S.W.2d 409, 411.

Doctor's report upon an electroencephalogram test is "record" of "condition" under Business Records as Evidence Act applicable in civil cases. Kraner v. Coastal Tank Lines, Inc., 257 N.E.2d 750, 755, 22 Ohio App.2d 1.

A "condition" is any qualification, restriction, or limitation annexed to a gift, and modifying or destroying essentially its full enjoyment and disposal. In re Wachstetter's Estate, 216 A.2d 66, 69, 420 Pa. 219, 25 A.L.R.3d 752.

In a contract, a "condition", whether precedent or subsequent, may be either express, implied in fact, or constructive. Ross v. Harding, 391 P.2d 526, 530, 64 Wash.2d 231.

Terms "disability" and "condition" are synonymous only in a limited sense; a "disability" is a "condition" but "condition" is much broader term than "disability". Brunson v. Strong, 412 P.2d 451, 452, 17 Utah2d 364.

Use of word "conditions" in deposit receipt contract for sale of land as an exception to obligation to convey marketable title would encompass and include a condition coupled with a possibility of reverter. Hurd v. Becker, Fla.App., 165 So.2d 420, 422, 423.

Even if there was causal relationship between fact that locus for which variance was sought was contiguous to business zone which had become highly commercialized and fact that cost of residential development of property was prohibitive, such contiguity could not be considered a "condition" especially affecting land, within meaning of statute. Coolidge v. Zoning Bd. of Appeals of Framingham, 180 N.E.2d 670, 673, 343 Mass. 742.

A "condition" is normally a limitation of some otherwise broader provision as distinguished from an independent obligation assumed by promisor. Bluewaters, Inc. v. Boag, C.A.Mass., 320 F.2d 833, 835.

The difference between "condition" and "conditional limitation" is that in former, re-entry is necessary, in case of breach, to effectuate forfeiture, while in latter, it is not. De Kay v. Board of Ed. of Central School Dist. No. 2, of Towns of Bath, Cameron, Wheeler, Urbana, Thurston, Avoca and Howard, Steuben County, 189 N.Y.S.2d 105, 108, 20 Misc.2d 881.

Failure of road contractor to warn the traveling public that highway is dangerous to travel or that obstructions have been placed thereon constitutes continuing negligence as distinguished from a "condition". Kuska v. Nichols Const. Co., 48 N.W.2d 682, 687, 154 Neb. 580.

Provision of accident and health policy that insurance shall not cover any person over age of 65 years constitutes a "condition" or "limitation" for benefit of insurer and not for benefit of insured, and is subject to waiver by insurer. American Home Mut. Life Ins. Co. v. Harvey, 109 S.E.2d 322, 325, 99 Ga.App. 582.

While the word "condition" may conceivably embrace almost any circumstance, upon which, or, because of which, a right is created or liability attaches, it cannot be used to mean surrender of fundamental personal and property absolutes unless word appears within a setting which warns of potency of capitulation being made. Cutler Corp. v. Latshaw, 97 A.2d 234, 236, 374 Pa. 1.

Quoted words, in statute enabling utility to contract with manufacturer without reference to prescribed rates or other "conditions", had reference to other conditions and factors relevant to rates and did not authorize Commission, in approving utility's

...tract with manufacturer, to disregard requirements of another utility's grandfather clause certificate. Capital Elec. Power Ass'n v. Mississippi Power & Light Co., 125 So.2d 739, 744, 240 Miss. 139.

Where contract whereby city redevelopment agency conveyed land provided that "in the event the holder or holders of such building loan agreements and/or first mortgages in replacement thereof shall fail to complete the work in area covered," grantee "shall reconvey" to agency all property conveyed with improvements "but subject to existing building loan agreements and/or first mortgages in replacement thereof," language spelled out intention that conveyance was on "condition" of performance within specified time, and hence failure to perform within specified time entitled agency to compel a reconveyance of premises subject to equitable lien against property in favor of mortgagee to extent that his money had been used for acquisition and retention of the property, as against contention that mortgagee had right to complete the performance beyond the specified time. Feldman v. Urban Commercial, Inc., 165 A.2d 854, 863, 64 N.J.Super. 364.

In statute providing that Public Utilities Commission shall not require company to issue stock under "terms" or "conditions" not required by general statutes, the quoted words are employed in the sense in which they are ordinarily used, "terms" means time and amounts of payment, stipulations regarding payment, price or wages, and "conditions" includes that which limits or modifies the existence or character of something, a restriction or qualification. Southern New England Tel. Co. v. Public Utilities Commission, 134 A.2d 351, 354, 144 Conn. 516.

Lease providing that in case of "condition" effectual in city, state, or nation adversely affecting or making it unprofitable for lessee to carry on its business on leased premises, lease may be cancelled by lessee by 90-day notice, did not give lessee right to cancel lease because of existence of any condition or because of existence of unfavorable economic conditions; word "condition" was required to be read in context with other words of paragraph of lease and in such context referred to conditions in nature of laws or law-like conditions. Lloyd v. Merit Loan Co. of Shreveport, La.App., 245 So.2d 427, 429.

Phrase "harmful effects" as utilized in particular statute defining "Child in need of assistance" affords adequate guidance for its application and enforcement, but term "conditions" is indefinite, and statute, under which petition was filed, fell short of standard of specificity constitutionally required as matter of due process. In Interest of Wall, Iowa, 295 N.W.2d 455, 458.

There is no support for conclusion that where disabling mental condition is shown to be causally related to industrial injury it is compensable only if it bears definition of "disease" or "illness" as opposed to any other label; terms "disease," "condition," and "disability" have been used interchangeably in the discussion of mental conditions alleged to be causally related to industrial injury. Hooper v. Industrial Commission of Arizona, App., 617 P.2d 538, 540, 126 Ariz. 586.

Limitation of word "condition" to preexisting disease under prior existing law was inapplicable to ...n context of statute providing that compensation will be allowed only for such proportion of disability resulting from aggravation of preexisting "condition" as may be attributable to compensable injury. Balliet v. North Dakota Workmen's Compensation Bureau, N.D., 297 N.W.2d 791, 793.

Use of word "condition" in workmen's compensation statute providing for allowance of compensation for disability resulting from aggravation of preexisting "condition" in proportion attributable to compensable injury does not allow Workmen's Compensation Bureau to prorate benefits in case where claimant has had no previous impairment, but rather, to activate statute, preexisting condition must be accompanied by actual impairment or disability known in advance of work-related injury; overruling in part Stout v. N. D. Workmen's Compensation Bureau, 236 N.W.2d 889 (N.D.1975). Id.

Cause distinguished

Distinction between a "cause" and a "condition" is the element of foreseeability. Long v. Ponca City Hospital, Inc., Okl., 593 P.2d 1081, 1086.

Where fire aboard tug while in shipyard had been caused by shipyard's negligence and its additional errors, in failing to properly extinguish fire, were exactly of same kind as tug owners, shipyard's negligence could not properly be held to have been only a "condition" rather than a "cause" of the ultimate damage resulting from fire which, after being incompletely extinguished on several occasions, finally ran out of control and caused extensive damage to vessel. Southport Transit Co. v. Avondale Marine Ways, Inc., C.A.La., 234 F.2d 947, 951.

Where course adopted by Coast Guard cutter, in attempting to tow barge in course of rescue operation at sea, would have been a successful one had barge followed in a proper course, navigation of cutter close to breakwater, with which barge collided, was merely a "condition" and barge's failure to follow the cutter was the "cause" of the barge's damage, and therefore libel by owner of barge against the United States should have been dismissed. P. Dougherty Co. v. U.S., C.A.Del., 207 F.2d 626, 632.

Cause of injury distinguished

Irritation of workmen's compensation claimant's nerve roots because of the presence of ruptured disc was an "injury" rather than a "condition," where claimant received ruptured disc at work and experienced pain as result thereof, so that statute providing that preliminary agreement may be amended if due to a failure to correctly diagnose injury it fails to set out correctly all the injuries received or fails to set out all parts of the body affected by such injuries was applicable. U.S. Rubber Co. v. Curis, 226 A.2d 410, 415, 101 R.I. 627.

Conditional limitation and limitation distinguished

A "condition" is a limitation, and does not create an obligation, nonperformance of which would constitute default. Adair v. Kona Corp., 452 P.2d 449, 454, 51 Haw. 104, 140.

In order to terminate lease for breach of "condition" in lease, some act must be done on happening of contingent event such as making an entry, but in order to terminate lease in case of breach of "conditional limitation" in lease, mere happening of event

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is, in itself, limit beyond which lease no longer exists and in such a case, no entry or other act is necessary to terminate lease. Jamaica Builders Supply Corp. v. Buttelman, 205 N.Y.S.2d 303, 306, 25 Misc.2d 326.

Where, upon happening of an event, landlord has option to continue or to terminate lease, lease does not expire by its own limitation on happening of the event, and there is merely a "condition", so that some act must be done in order to defeat the estate, and not a "conditional limitation", so that happening of event automatically terminates the estate. Obedin v. Masiello, 191 N.Y.S.2d 254, 258, 20 Misc.2d 101.

Clause of lease providing that if land whereon building stood or any part thereof should be condemned for public use, lease, at option of landlord, shall become void, created a "condition", so that some act was required to be done by landlord in order to defeat the estate, and not a "conditional limitation", so that happening of the event automatically terminated the estate. Id.

Consideration

Under Vehicle Code section which prohibits operation or parking of vehicles on the grounds of, inter alia, private universities, except subject to "conditions and regulations" imposed by university officers, private university's governing board could impose "conditions and regulations" pertaining to parking and because parking fee was a "condition" within the meaning of the section, university had authority to charge faculty, staff and students a fee to park on university property. United Stanford Emp., Local 680 v. Board of Trustees of Leland Stanford Junior University, 136 Cal.Rptr. 553, 556, 67 C.A.3d 319.

Covenant distinguished

Requirement that testatrix' husband pay for insurance, taxes, and repairs on home he selected from those owned by testatrix was a "covenant" and not a "condition". Austin v. Pepperman, 179 So.2d 299, 308, 278 Ala. 551.

Provision of oil and gas lease that while shut-in royalty is paid the well shall be held to be a producing well within meaning of paragraph providing that lease should remain in force as long as gas is produced or producible was a "condition," not a covenant, and lessees' failure to pay the annual sum rendered applicable the provision for termination in event of cessation of production and lease terminated upon failure of lessees to conduct drilling operations within 90-day period after cessation of production due to leak in gas pipeline. Greer v. Salmon, 479 P.2d 294, 298, 82 N.M. 245.

Courts abhor a forfeiture and will construe a clause as a "covenant" rather than as a "condition" if it is possible to do so. Royce, Inc. v. U.S., Ct.Cl., 126 F.Supp. 196, 204.

Where provision of printed lease stated space was "to be used exclusively for following purposes (see instruction number 3): military purposes", the words "military purposes" being typed in blank space, and where instruction number 3 stated that only general nature of use was to be specified, provision was not a "limitation" or "condition" but was descriptive and, at most, a "covenant", any breach of which would not result in forfeiture. Id.

A distinction exists between a "covenant" and a "condition," in that a breach of a covenant will not per se effect a forfeiture of title, whereas breach of a condition will entitle a grantor to a revesting of title. Feldman v. Urban Commercial, Inc., 165 A.2d 854, 863, 64 N.J.Super. 364.

Provision in automobile collision policy that in case lessee, mortgagor, or owner shall neglect to pay any premium due under policy, lienholder shall, on demand, pay the premium embodied a "condition," which required lienholder to pay premium only from and after date of demand, if lienholder desired to keep insurance in force, and did not embody a "covenant" on part of lienholder to pay the premium. General Credit Corp. v. Imperial Cas. & Indem. Co., 95 N.W.2d 145, 152, 167 Neb. 833.

If breach of agreement pertains to the validity of the instrument or is a ground for forfeiture, it is a "condition," while if the remedy for breach is an action at law for damages, the agreement is a "covenant." Buchanan v. Johnson, Tenn.App., 595 S.W.2d 827, 831.

Creation and Construction

As used in deposit receipt contract for sale of realty excepting, inter alia, from obligation to convey marketable title "conditions" of record running with the land, quoted word included condition appearing in conveyance in chain of title providing for reverter upon 60 days' notice to comply with enumerated restrictions, conditions and limitations and failure to comply therewith, and hence reverter clause did not relieve purchasers from obligation to accept title subject thereto. Hurd v. Becker, Fla.App., 165 So.2d 420, 422, 423.

Event or contingency

A "condition" is premise upon which fulfillment of an agreement depends; also covenant and provision making effect of legal instrument contingent upon uncertain event. Matter of J.M.J., S.D., 368 N.W.2d 602, 606.

Term "condition" is ordinarily reserved to describe acts or events which must occur before a duty of performance under an existing contract becomes absolute. Hardin v. Cliff Pettit Motors, Inc., D.C.Tenn., 407 F.Supp. 297, 300.

Within statute providing that whenever property is transferred and any right is dependent upon contingency or condition, whereby it may be created, defeated, extended or abridged, inheritance tax shall be imposed upon transfer and shall be highest tax which would probably become payable upon transfer under circumstances presented by the contingency or condition, "contingency" or "condition" do not include fiduciary powers of invasion held by trustee. In re Coleman's Estate, 535 P.2d 227, 232, 35 Colo.App. 390.

"Promise" is manifestation of intention to act or refrain from acting in specified way, so made as to justify promisee in understanding that commitment has been made, whereas "condition" is event, not certain to occur, which must occur, unless its nonoccurrence is excused, before performance under contract becomes due. Merritt Hill Vineyards, Inc. v. Windy Heights Vineyard, Inc., 460 N.E.2d 1077, 1081, 61 N.Y.2d 106, 472 N.Y.S.2d 592, 596.

Limitation of risk or liability

A "condition" in a contract is a clause which has for its object the suspension, rescission, or modification of the principal obligation. George v. Houston Boxing Club, Inc., Tex.Civ.App., 423 S.W.2d 128, 132.

Requirement of group insurer that employees to be eligible must be employed at least 30 hours a week was a "condition" of insurance and not a "limitation" of the risk and insurer which failed to investigate during contestable period to determine whether one employee worked 30 hours per week could not be heard to complain after death of employee and beneficiary was entitled to recover on policy. Simpson v. Phoenix Mut. Life Ins. Co., 247 N.E.2d 655, 659, 24 N.Y.2d 262, 299 N.Y.S.2d 835.

Within rule that owner of property is not liable for spread of fire which is accidentally started thereon by act of stranger or by some other cause with which he is not connected, unless he is guilty of negligence in respect to the "condition" of his premises or in failing to prevent the spread of the fire, after he has notice of the existence of the fire on premises, "condition" contemplates an unusually hazardous situation affirmatively created or maintained by the owner which gives rise to an extraordinary and undue risk of combustibility, and such situation must arise from a cause other than the mere age of the building. B. W. King, Inc. v. Town of West New York, 230 A.2d 133, 138, 49 N.J. 318.

Provision

The word "condition", as used in Louisiana statute providing that a person may, in his own name, make some advantage for third person the "condition" or consideration of a commutative contract, was not intended to mean a future and uncertain event, but rather was used in the sense of a charge or provision imposed upon or made part of a contract or donation. Merco Mfg., Inc. v. J. P. McMichael Const. Co., D.C.La., 372 F.Supp. 967, 972.

Provision of lease that if tenant should default in payment of rent, landlord could, without notice, re-enter by force or otherwise and dispossess tenant by summary proceedings or otherwise was "condition" rather than "conditional limitation," and therefore landlord's remedy was removal by reasonable force or by re-entry but not by summary proceedings unless tenant was presently in default of rent and proper notice or demand had been given. 19 South Main St. Corp. v. Phalanx Motors, Inc., 232 N.Y.S.2d 431, 434, 36 Misc.2d 114.

In contract writing "condition" is often used as synonymous with term, provision or clause. Reynolds-Fitzgerald, Inc., v. Journal Pub. Co., D.C.N.Y., 15 F.R.D. 403, 404.

Provision in deed conveying 40-acre tract to elders of local Presbyterian Church for full value that if there should cease to be church tract should be appropriated to use of common school at place was not a "condition", and trustees of Presbytery were entitled to tract on dissolution of local church. Trustees of Transylvania Presbytery, U.S.A., Inc. v. Garrard County Bd. of Ed., Ky., 348 S.W.2d 846, 852.

As to whether provision in insurance contract is condition or exclusion, for purposes of determining coverage under Georgia law, word "exclusions" signifies subject matter or circumstances in which insurer will not assume liability for specific risk or hazard that otherwise would be included within general scope of policy, while "condition" is provision inserted in contract for insurer's benefit that requires fulfillment of certain prerequisites before benefits will be released to beneficiary under the contract. Ideal Mut. Ins. Co. v. Lucas, D.C.Ga., 593 F.Supp. 466, 468.

Qualification synonymous

"Condition" in law of realty is qualification or restriction annexed to conveyance of lands whereby it is provided that in case particular event does or does not happen, or in case grantee does or omits to do a particular act, an estate may be defeated. Birnbaum v. Rollerama, Inc., 232 N.Y.S.2d 188, 190.

A "condition" is a qualification or restriction annexed to conveyance of lands, whereby it it provided that, in case a particular event does not happen, or in case grantor or grantee does or omits to do a particular act, an estate shall commence, be enlarged, or be defeated. Hurd v. Becker, Fla.App., 165 So.2d 420, 422, 423.

Quality

In evidence rule governing admissibility of written statement of act done or an act, "condition" or event observed by public official, word "condition" is to be defined as meaning quality or characteristics of a state of being, and is confined to perceptions of a quality or characteristic and excludes an interpretation of those perceptions. State v. Malsbury, 451 A.2d 421, 423, 186 N.J.Super. 91.

Status

Word "condition" as used in statute authorizing revocation of license of car dealer who misrepresents condition of any car sold must be given its plaint and ordinary meaning of the actual mechanical status of automobile, its state of repair or performance, and cannot be construed to mean a misrepresentation pertaining to prior ownership of vehicle. Fitzpatrick's Inc. v. Commissioner of Motor Vehicles, 334 A.2d 476, 478, 165 Conn. 416.

Where alien had served honorably in United States Navy for more than three years and had filed preliminary form for petition for naturalization prior to repeal of statute making it unnecessary for alien who had so served in armed forces to have first been lawfully admitted to United States for permanent residence as condition precedent to naturalization, alien acquired a "status", "condition," and "rights in process of acquisition" within saving clause of repealing statute and would not be required to establish as condition precedent to naturalization that he had been lawfully admitted to the United States for permanent residence. Immigration and Nationality Act, §§ 318, 328, 405(a), 8 U.S.C.A. §§ 1429, 1439, 1101 note. In re Jocson, D.C.Hawaii, 117 F.Supp. 528, 529.

Alien, whose status was adjusted to permanent resident as of April, 1948, by his continuous residence and physical presence in United States for 56 months prior to effective date of 1952 act providing that no person shall be naturalized unless he has been physically present in United States for periods totaling at least half of five years preceding filing of

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his petition for naturalization, achieved a "status" or "condition" within 1952 act provision that act should not affect any existing status or condition, alien's inchoate right to be naturalized under 1940 nationality act, which made no provision for any period of physical presence but did require five years' continuous residence, was preserved by saving clause and alien, who was transferred to his employer's office in foreign country in 1954 and who filed petition for naturalization in 1958, was entitled to be naturalized. Petition of Zaharia, D.C.N.Y., 166 F.Supp. 314, 318.

Terms

Term "condition", within rule of construction relating to whether words of contract create promise or an express condition, does not mean a mere term, expression, provision, or any particular group of words used in a contract, but is an operative fact or event, an act or performance by a promisee upon which existence of some particular legal relationship depends. Prager's, Inc. v. Bullitt Co., 463 P.2d 217, 222, 1 Wash.App. 575.

A "condition" is an uncertain event, whereas the "term" is an event which is bound to take place, even though it is not known when. In re Los Colinas, Inc., D.C.Puerto Rico, 294 F.Supp. 582, 602.

Warranties

Provision of burglary policy that assured would maintain protective devices was "promissory warranty" as well as "condition". Phoenix Ins. Co. v. Ross Jewelers, Inc., C.A.Ala., 362 F.2d 985, 988.

In view of fact that premium paid by owners of jewelry store for burglary insurance was based upon proposal as to what percentage of insured property would be kept locked in the safe when the store was closed, owners' warranty to keep sixty-five percent by value of insured property in store's safe when store was closed constituted "promissory warranty" and "condition", and owners who failed to comply with warranty were not entitled to recover under policy value of property lost in burglary. Great Am. Ins. Co. v. Lang, Tex.Civ.App., 416 S.W.2d 541, 553.

CONDITIONAL

See, also,

Fee Simple Conditional.

A guaranty is "conditional" if as a condition to liability on part of guarantor the happening of some contingent event, other than default of principal debtor, or performance of some act on part of creditor is required. Hawaii Leasing v. Klein, 698 P.2d 309, 313, 5 Haw.App. 450.

Where guarantor's liability under agreement guaranteeing lease was contingent upon lessee's selling leased equipment should lessee default, subject to right of guarantors or lessees who initially sell equipment in minimum period of 30 days after default, contract of guaranty was "conditional." Id.

A privilege is "conditional" because of requirements that declaration be reasonably calculated to accomplish the privileged purpose and that it be made without malice. Hett v. Ploetz, 121 N.W.2d 270, 273, 20 Wis.2d 55.

Texas recognizes validity of "conditional" or "contingent will", defined as a will which is to take effect only upon happening of a specified contingency. In re Craft's Estate, Tex.Civ.App., 358 S.W.2d 732, 734.

Where one accepts a check and note under agreement that specific, named contingency must be fulfilled before the instruments are to become payable, delivery of the check and note is "conditional" within uniform negotiable instruments law. Flaxmayer v. Snyder, 439 P.2d 545, 7 Ariz.App. 382.

Statute providing that as between immediate parties, and as regards a remote party other than a holder in due course, delivery of instrument may be shown to have been "conditional", does not include conditions which concede transfer of property in instrument and merely restrict source of payment. Oakland Medical Bldg. Corp. v. Aureguy, 261 P.2d 249, 250, 41 C.2d 521.

Alleged oral agreement between officer and principal stockholder of two corporations and first corporation's creditor that second corporation would advance $5,000 to creditor and that $5,000 was to be repaid by creditor only on receipt by him of $10,000 owing him by first corporation did not render delivery of $5,000 note to second corporation for $5,000 advance "conditional" within meaning of statute providing that as between immediate parties, and as regards a remote party other than a holder in due course, delivery of instrument may be shown to have been "conditional". Id.

If accused, after being informed that hybrid representation is not permissible option, continues to insist on conducting his own defense, but only with selective aid of counsel, it may be said that his assertion of right to self-representation is "conditional," and thus equivocal, and at that point trial court may deny right to self-representation. Scarbrough v. State, Tex.Cr.App., 777 S.W.2d 83, 93.

If accused, after being denied access to law books and law library due to concerns about potential delay, demands both self-representation and access to legal resources, it may be concluded that his invocation of right to self-representation is "conditional" and hence equivocal, and then trial court may deny right to self-representation. Id.

An interest may be "conditional" so that it is not deductible under provision of the Internal Revenue Code authorizing deduction for federal estate tax purposes of bequests or transfers exclusively for religious, charitable, scientific, literary, or educational purposes, because, though vested, it is subject to being divested by a gift over. Polster's Estate v. C. I. R., C.A.4, 274 F.2d 358, 362, 363, 365.

Question whether gift to charity is conditional, so that it is not deductible under provision of Internal Revenue Code authorizing deduction for federal estate tax purposes of bequests or transfers exclusively for religious, charitable, scientific, literary, or educational purposes, is tested by general and practical considerations of fact arising in each particular case and does not turn on whether interest in property is vested or contingent or whether condition on which bequest depends is precedent or subsequent under technical rules of property law, but if, under state property law, there is almost no possibility that anyone other than named charitable beneficiary will take gift, then it is not "conditional" as a practical matter. Id.

APPENDIX 13

They are *possible* or *impossible*: the former when they admit of performance in the ordinary course of events; the latter when it is contrary to the course of nature or human limitations that they should ever be performed.

They are *lawful* or *unlawful*: the former when their character is not in violation of any rule, principle, or policy of law; the latter when they are such as the law will not allow to be made.

They are *consistent* or *repugnant*: the former when they are in harmony and concord with the other parts of the transaction; the latter when they contradict, annul, or neutralize the main purpose of the "contract". Repugnant conditions are also called "insensible".

They are *affirmative* or *negative*: the former being a condition which consists in doing a thing, as provided that the lessee shall pay rent, etc.; the latter being a condition that consists in not doing a thing, as provided that the lessee shall not alien, etc.

They are *precedent* or *subsequent*. A condition precedent is one which must happen or be performed before the estate to which it is annexed can vest or be enlarged; or it is one which is to be performed before some right dependent thereon accrues, or some act dependent thereon is performed. A fact other than mere lapse of time which must exist or occur before a duty of immediate performance of a promise arises. U. S. v. Schaeffer, C.A.Wash., 319 F.2d 907, 911. A "condition precedent" is one that is to be performed before the agreement becomes effective, and which calls for the happening of some event or the performance of some act after the terms of the contract have been arrested on, before the contract shall be binding on the parties; *e.g.* under disability insurance contract, insured is required to submit proof of disability before insurer is required to pay. Sherman v. Metropolitan Life Ins. Co., 297 Mass. 330, 8 N.E.2d 892. A condition subsequent is one annexed to an estate already vested, by the performance of which such estate is kept and continued, and by the failure or non-performance of which it is defeated; or it is a condition referring to a future event, upon the happening of which the obligation becomes no longer binding upon the other party, if he chooses to avail himself of the condition. Co.Litt. 201; Carroll v. Carroll's Ex'r, 248 Ky. 386, 58 S.W.2d 670, 672. A condition subsequent is any condition which divests liability which has already attached on the failure to fulfill the condition as applied in contracts, a provision giving one party the right to divest himself of liability and obligation to perform further if the other party fails to meet condition, *e.g.*, submit dispute to arbitration. In property law, a condition which causes defeasance of estate on failure to perform, *e.g.* fee simple on condition. In lease, a provision giving lessor right to terminate for tenant's failure to perform condition.

Conditions may also be *positive* (requiring that a specified event shall happen or an act be done) and *restrictive* or *negative*, the latter being such as impose an obligation not to do a particular thing, as, that a lessee shall not alien or sub-let or commit waste, or the like.

They may be *single*, *copulative*, or *disjunctive*. Those of the first kind require the performance of one specified thing only; those of the second kind require the performance of divers acts or things; those of the third kind require the performance of one of several things.

Conditions may also be *independent*, *dependent*, or *mutual*. They belong to the first class when each of the two conditions must be performed without any reference to the other; to the second class when the performance of one condition is not obligatory until the actual performance of the other; and to the third class when neither party need perform his condition unless the other is ready and willing to perform his or, in other words, when the mutual covenants go to the whole consideration on both sides and each is precedent to the other.

The following varieties may also be noted: A condition *collateral* is one requiring the performance of a collateral act having no necessary relation to the main subject of the agreement. A *compulsory* condition is one which expressly requires a thing to be done, as, that a lessee shall pay a specified sum of money on a certain day or his lease shall be void. *Concurrent* conditions are those which are mutually dependent and are to be performed at the same time or simultaneously. A condition *inherent* is one annexed to the rent reserved out of the land whereof the estate is made, or rather, to the estate in the land, in respect of rent.

French law. Conditions in French law are of the following types:

The following peculiar distinctions are made: (1) A condition is *casuelle* when it depends on a chance or hazard; (2) a condition is *potestative* when it depends on the accomplishment of something which is in the power of the party to accomplish; (3) a condition is *mixte* when it depends partly on the will of the party, and partly on the will of others; (4) a condition is *suspensive* when it is a future and uncertain event, or present but unknown event, upon which an obligation takes or fails to take effect; (5) a condition is *resolutoire* when it is the event which undoes an obligation, which has already had effect as such.

Synonymous distinguished. A "condition" is to be distinguished from a *limitation*, in that the latter may be to or for the benefit of a stranger, who may then take advantage of its determination, while only the grantor, or those who stand in his place, can take advantage of a condition. Also, a limitation ends the estate without entry or claim, which is not true of a condition. It also differs from a *conditional limitation*. In determining whether, in the case of estates greater than estates for years, the language constitutes a "condition" or a "conditional limitation," the rule applied is that, where an estate is so expressly limited by the words of its creation that it cannot endure for any longer time than until the condition happens on which the estate is to fail, this is limitation, but when the estate is expressly granted on condition in deed, the law permits it to endure beyond the time of the contingency happening, unless the grantor takes advantage of the breach of condition by making entry. It differs also from a *covenant*, which can be made by either grantor or grantee, while only the grantor can make a condition. The chief distinction between a condition subsequent in a deed and a covenant pertains to the remedy in event

Black's Law Dictionary, 5th Edition, 1979

Condictio /kandi(k)sh(iy)ow/. In Roman law, a general term for actions of a personal nature, founded upon an obligation to give a certain and defined thing or service. It is distinguished from *vindicatio rei*, which is an action to vindicate one's right of property in a thing by regaining (or retaining) possession of it against the adverse claim of the other party.

Condictio certi /kandi(k)sh(iy)ow sárday/. An action which lies upon a promise to do a thing, where such promise or stipulation is certain *(si certa sit stipulatio)*.

Condictio ex lege /kandi(k)sh(iy)ow èks liyjiy/. An action arising where the law gave a remedy, but provided no appropriate form of action.

Condictio indebitati /kandi(k)sh(iy)ow andèbatéyday/. An action which lay to recover anything which the plaintiff had given or paid to the defendant, by mistake, and which he was not bound to give or pay, either in fact or in law.

Condictio rei furtivæ /kandi(k)sh(iy)ow riyay fartáyviy/. An action which lay to recover a thing stolen, against the thief himself, or his heir.

Condictio sine causa /kandi(k)sh(iy)ow sáyniy kóza/. An action which lay in favor of a person who had given or promised a thing without consideration *(causa)*.

Conditio /kandish(iy)ow/. Lat. A condition.

Conditio beneficialis, quæ statum construit, benigne secundum verborum intentionem est interpretanda; odiosa autem, quæ statum destruit, stricte secundum verborum proprietatem accipienda /kandish(iy)ow bènəfishiyéyləs kwiy stéydəm kónstruwət banígniy sakándəm varbóram intènshiyównəm èst intərprətándə; òwdiyówsə ódəm, kwiy stéydəm déstruwət, stríktiy sakándəm varbóram prəpràyətéydəm aksipiyéndə/. A beneficial condition, which creates an estate, ought to be construed favorably, according to the intention of the words; but a condition which destroys an estate is odious, and ought to be construed strictly according to the letter of the words.

Conditio dicitur, cum quid in casum incertum qui potest tendere ad esse aut non esse, confertur /kandish(iy)ow dísədər kàm kwíd in kéysəm insárdəm kwày pówdəst téndəriy àd ésiy òt nón èsiy kənfárdər/. It is called a "condition" when something is given on an uncertain event, which may or may not come into existence.

Conditio illicita habetur pro non adjecta /kandish(iy)ow alísədə həbiydər pròw non ajékta/. An unlawful condition is deemed as not annexed.

Condition. A future and uncertain event upon the happening of which is made to depend the existence of an obligation, or that which subordinates the existence of liability under a contract to a certain future event. Provision making effect of legal instrument contingent upon an uncertain event. See also **Constructive condition; Contingency; Contingent; Proviso.**

A clause in a contract or agreement which has for its object to suspend, rescind, or modify the principal obligation, or, in case of a will, to suspend, revoke, or modify the devise or bequest. A qualification, restriction, or limitation modifying or destroying the original act to which it is connected; an event, fact, or the like that is necessary to the occurrence of some other, though not its cause; a prerequisite; a stipulation.

A qualification or restriction annexed to a conveyance of lands, whereby it is provided that in case a particular event does or does not happen, or in case the grantor or grantee does or omits to do a particular act, an estate shall commence, be enlarged, or be defeated.

An "estate on condition" arises where an estate is granted, either in fee simple or otherwise, with an express qualification annexed, whereby the estate granted shall either commence, be enlarged, or be defeated, upon performance or breach of such qualification or condition.

In insurance parlance, the printed conditions on the inside of the policy which serve generally as a limitation of risk or of liability or impose various conditions requiring compliance by the insured.

Mode or state of being; state or situation; essential quality; property; attribute; status or rank.

Civil law. Conditions in the civil law are of the following types:

The *casual* condition is that which depends on chance, and is in no way in the power either of the creditor or of the debtor. Civ.Code La. art. 2023.

A *mixed* condition is one that depends at the same time on the will of one of the parties and on the will of a third person, or on the will of one of the parties and also on a casual event. Civ.Code La. art. 2025.

The *potestative* condition is that which makes the execution of the agreement depend on an event which it is in the power of the one or the other of the contracting parties to bring about or to hinder. Civ. Code La. art. 2024.

A *resolutory* or *dissolving* condition is that which, when accomplished, operates the revocation of the obligation, placing matters in the same state as though the obligation had not existed. It does not suspend the execution of the obligation. It only obliges the creditor to restore what he has received in case the event provided for in the condition takes place. Civ.Code La. art. 2045.

A *suspensive* condition is that which depends, either on a future and uncertain event, or on an event which has actually taken place, without its being yet known to the parties. In the former case, the obligation cannot be executed till after the event; in the latter, the obligation has its effect from the day on which it was contracted, but it cannot be enforced until the event be known. Civ.Code La. art. 2043; New Orleans v. Railroad Co., 171 U.S. 312, 18 S.Ct. 875, 43 L.Ed. 178. A condition which prevents a contract from going into operation until it has been fulfilled.

Classification. Conditions are either *express* or *implied*, the former when incorporated in express terms in the deed, contract, lease, or grant; the latter, when inferred or presumed by law, from the nature of the transaction or the conduct of the parties, to have been tacitly understood between them as a part of the agreement, though not expresaly mentioned.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 651—August Term 1989

Submitted: March 1, 1990 Decided: June 22, 1990
Docket No. 89-2389

JOHN J. MCCARTHY,
Plaintiff-Appellant,
—v.—
GEORGE BRONSON, WARDEN, LT. STEVE T. OZIER, OFFICER PAUL LUSA, and OFFICER MICHIEWICZ, Individually and in their official capacities as Officers of the Connecticut Department of Correction,
Defendants-Appellees.

Before:

OAKES, *Chief Judge*,
NEWMAN and WALKER, *Circuit Judges*.

Appeal from the June 19, 1989, judgment of the District Court for the District of Connecticut (José A. Cabranes, Judge) in a suit brought under 42 U.S.C.

§ 1983 (1982) alleging unlawful removal of plaintiff from his cell and use of excessive force.

Affirmed.

JOHN J. MCCARTHY, Leavenworth, Kan., submitted a *pro se* brief *for plaintiff-appellant*.

CLARINE NARDI RIDDLE, Atty. Gen., Steven R. Strom, Asst. Atty. Gen., Hartford, Conn., submitted a brief *for defendants-appellees*.

JON O. NEWMAN, *Circuit Judge*:

John J. McCarthy, a state prisoner, appeals *pro se* from the June 19, 1989, judgment of the District Court for the District of Connecticut (José A. Cabranes, Judge) in favor of the defendant state prison officials. McCarthy sued under 42 U.S.C. § 1983 (1982), alleging unlawful removal from his cell and use of excessive force. The judgment was entered after a hearing conducted by Magistrate F. Owen Eagan. The case is complicated by some uncertainty as to the authority of the Magistrate in recommending proposed findings to the District Judge and the authority of the District Judge in approving those recommended findings. The appeal challenges procedural irregularities concerning the reference to the Magistrate, the lack of a jury trial, the denial of a free copy of a hearing transcript, and the merits of the fact-finding. We affirm.

Before setting forth the procedural facts, it will be helpful to outline pertinent provisions of the Federal Magistrates Act, 28 U.S.C. §§ 631-39 (1982 & Supp. V 1987). Four types of reference from a district judge to a magistrate are implicated in this case. First, subsection 636(b)(1) permits a judge to designate a magistrate to handle pretrial matters, with the Magistrate authorized by subsection 636(b)(1)(A) to rule on most pretrial motions and authorized by subsection 636(b)(1)(B) to recommend rulings on motions excepted from subsection 636(b)(1)(A). Second, subsection 636(b)(1)(B) also permits a judge to designate a magistrate "to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court . . . of prisoner petitions challenging conditions of confinement." Third, subsection 636(b)(2) permits a judge to designate a magistrate "to serve as a special master pursuant to the applicable provisions of [Title 28] and the Federal Rules of Civil Procedure." This subsection also permits a judge to designate a magistrate to serve as a special master in any civil case, upon consent of the parties, without regard to Fed. R. Civ. P. 53(b), which limits use of a master to exceptional cases. Fourth, subsection 636(c) permits a magistrate, upon consent of the parties, to try any civil case and render a judgment.

Background

Plaintiff's original complaint, filed in April, 1983, alleged that various officials at the Connecticut Correctional Institution at Somers had ordered or carried out his forcible removal from his prison cell by means of tear gas and excessive force, in violation of the Eighth

and Fourteenth Amendments. The complaint named only Warden Robinson as a defendant and made no demand for a jury trial. Shortly after the complaint was filed, Judge Cabranes referred the case to Magistrate Eagan for pretrial proceedings under 28 U.S.C. § 636(b)(1)(A), a reference that was soon broadened. On February 28, 1985, in open court the plaintiff and defendant's counsel executed a standard consent form, agreeing to have the case tried by a magistrate, pursuant to 28 U.S.C. § 636(c), and electing to take any appeal from the magistrate's judgment to the district judge, pursuant to § 636(c)(4). At that time, the Magistrate explained to McCarthy that the trial would be held by the Magistrate at Somers Prison without a jury. McCarthy did not object. Conducting non-jury trials at the prison frequently benefits a prisoner-claimant, since witnesses and documents, needed unexpectedly, are more accessible. On March 5, 1985, Judge Cabranes entered an order referring the case to Magistrate Eagan "for all further proceedings and the entry of judgment in accordance with Title 28, § 636(c)."

On April 12, 1985, McCarthy filed an amended complaint. This complaint added several defendants but did not alter the substantive allegations. It made no jury demand. On July 2, 1985, he filed a second amended complaint, again adding parties but not altering his substantive allegations. This complaint contained a jury demand. Defendants filed their answer to the second amended complaint on August 26, 1985. No answer had been filed to the prior complaints.

On October 23, 1986, defendants filed papers opposing plaintiff's jury demand, contending, among other things, that McCarthy had agreed to a non-jury trial

before the Magistrate on February 28, 1985. On December 22, 1986, Judge Cabranes ruled that plaintiff was not entitled to a jury trial; he relied on the absence of a timely jury demand, *see* Fed. R. Civ. P. 38(b), (d), and noted that the right to a jury trial, once waived, is not revived by an amended complaint that raises no new issues, *see Lanza v. Drexel & Co.*, 479 F.2d 1277, 1310-11 (2d Cir. 1973) (in banc). On October 22, 1987, McCarthy moved for a jury trial; the Magistrate recommended denial based on the District Judge's 1986 ruling, and Judge Cabranes adopted this recommendation on January 29, 1988.

On March 24, 1988, plaintiff appeared before the Magistrate for a bench trial at Somers Prison. At the start of the trial, the Magistrate sought a second written consent to proceed under subsection 636(c), even though a first consent had been executed on February 28, 1985. McCarthy refused. Apparently, the Magistrate construed McCarthy's refusal to sign the second consent form as a motion to withdraw the original consent and granted the motion. Magistrate Eagan then conducted an eight-day trial at the conclusion of which he issued a decision entitled "Recommended Findings of Fact and Memorandum of Decision." He recommended detailed findings of fact and ultimate conclusions that excessive force had not been used and that no unlawful action had occurred. When the matter reached the District Court, Judge Cabranes accepted the recommended findings and ordered judgment for the defendants. His endorsement of the Magistrate's proposed findings reflected the Judge's understanding that the matter had been referred under subsection 636(b)(1), *i.e.*, referred for recommended findings. However, in ruling on post-judgment motions, Judge Cabranes amended the citation to sub-

but does refer to "petitions under section 1983 of Title 42." H.R. Rep. No. 1609, 94th Cong., 2d Sess. 11, *reprinted in* 1976 U.S. Code Cong. & Admin. News 6162, 6171. Most courts have construed the phrase broadly to include almost any complaint made by a prisoner against prison officials, *see Branch v. Martin*, 886 F.2d 1043, 1045 n.1 (8th Cir. 1989) (collecting cases). However, there is a minority view that has focused on the phrase "conditions of confinement" and concluded that it covers only challenges to pervasive prison conditions and excludes claims concerning specific episodes of misconduct by prison officials. *See e.g., Houghton v. Osborne*, 834 F.2d 745 (9th Cir. 1987); *Hill v. Jenkins*, 603 F.2d 1256, 1259 (7th Cir. 1979) (Swygert, J., concurring).

We see no reason why a Magistrate with clear authority to hold hearings and recommend findings as to the unconstitutionality of continuing prison conditions may not perform a similar function as to specific episodes of unconstitutional conduct by prison officials. The phrase "conditions of confinement" appears not to have been selected as a limitation to preclude episodes of misconduct, but rather as a generalized category covering all grievances occurring during prison confinement. This meaning emerges from comparing the phrase with the immediately preceding category in subsection 636(b)(1)(B) that covers "applications for posttrial relief made by individuals convicted of criminal offenses." Congress evidently wished magistrates to assist district judges with respect to all prisoner claims and selected phrases to describe the two broad categories of prisoner claims cognizable under 28 U.S.C. §§ 2254, 2255 (challenges to convictions) and 42 U.S.C. § 1983 (challenges

to conditions of confinement). *See generally Preiser v. Rodriguez*, 411 U.S. 475 (1973).

The Magistrate was therefore entitled to hold a hearing on McCarthy's complaint and submit recommended findings to the District Judge.

2. *The Authority of the District Judge.* After initially viewing the Magistrate's proposed findings as submitted under subsection 636(b)(1) and adopting them, Judge Cabranes altered his view in his post-judgment ruling and considered the Magistrate's findings to be "essentially" those of a special master acting under subsection 636(b)(2). Then, explicitly referring to Rule 53(e)(2) of the Federal Rules of Civil Procedure, governing judicial consideration of a master's findings in a nonjury case, the District Judge accepted the findings as not clearly erroneous, the standard under Rule 53(e)(2). Had the Judge stopped there, his ruling would have been infirm for two reasons.

First, the Magistrate made and forwarded his findings under subsection 636(b)(1), and that subsection requires *de novo* review of any proposed findings to which objection was made. Though we are confident that the Magistrate would exercise the same high degree of care and conscientiousness whether his findings were to be reviewed *de novo* or under a clearly erroneous standard, we would have considerable doubt whether proposed findings made in the expectation of plenary review would be valid, absent reassessment by the recommender, if in fact they received review only under a less rigorous standard. Second, we would also doubt whether this fairly straightforward section 1983 suit would qualify for reference to a special master under the exacting

section 636(b)(1) and stated that after allowing the plaintiff to withdraw his consent, Magistrate Eagan had "essentially act[ed] as a special master pursuant to his powers under 28 U.S.C. § 636(b)(2) and Rule 1(C)(5) of the Local Rules." Judge Cabranes then adopted the Magistrate's recommended findings, acting under Fed. R. Civ. P. 53(e)(2), which requires a district judge to accept a special master's findings of fact unless clearly erroneous. Finally, the District Judge added, "Even upon a *de novo* determination I would reach the same conclusions as the Magistrate." All motions for post-judgment relief were denied.

Discussion

The tangled sequence of events has created some problems, but none that impairs the validity of the judgment rejecting plaintiff's claims on their merits.

1. *The Authority of the Magistrate.* The parties' February 28, 1985, consent to have the matter tried by the Magistrate pursuant to subsection 636(c) was entirely valid. Once given, that consent may be withdrawn on the Court's own motion "for good cause shown" or on request of a party who shows "extraordinary circumstances" warranting such relief. 28 U.S.C. § 636(c)(6); *see Fellman v. Fireman's Fund Insurance Co.*, 735 F.2d 55, 57-58 (2d Cir. 1984). No such circumstances existed in this case. The Magistrate therefore could have proceeded under the original 636(c) reference, made findings, and entered judgment. However, he elected not to do so, preferring instead to permit McCarthy to withdraw consent to the 636(c) reference.

Having vacated the 636(c) reference, the Magistrate then used the authority of subsection 636(b)(1)(B) to conduct a hearing and recommend proposed findings of fact concerning "prisoner petitions challenging conditions of confinement." Whether he acted permissibly is our initial inquiry. The matter had originally been referred to the Magistrate for pretrial purposes, under the authority of subsections 636(b)(1)(A) and (B). Arguably, vacating the 636(c) reference left the Magistrate with only the pretrial assignment he had originally been given, but we do not think he was required to take such a narrow view of his authority. With complete propriety, he could have declined to vacate the 636(c) consent and adjudicated the merits definitively. He was surely entitled to take the lesser step of hearing the evidence and submitting recommended findings to the District Judge. The parties' consent is not required for using that procedure, and it is obvious, from the District Judge's subsequent approval of the Magistrate's findings, that the Judge welcomed the Magistrate's help. It would be a needless ritual now to require the District Judge formally to refer the matter under the "prisoner petition" clause of subsection 636(b)(1)(B). The Judge's adoption of the recommended findings demonstrates that the Magistrate was acting entirely in conformity with authority the Judge wished him to exercise.

A more substantial question is whether McCarthy's lawsuit is a petition "challenging the conditions of confinement" within the meaning of subsection 636(b)(1)(B). Subsection 636(b)(1)(B) was added in 1976 as part of a broadening of the authority of magistrates. Act of Oct. 21, 1976, Pub. L. 94-577, 90 Stat. 2729. The House Report does not explain the category "prisoner petitions challenging conditions of confinement"

standards of Rule 53(b) (in nonjury matters "a reference shall be made only upon a showing that some exceptional condition requires it" except where a claim requires an accounting or a difficult computation of damages).

Fortunately, the District Judge did not confine his review to the narrow scope appropriate for findings of a special master. Judge Cabranes explicitly determined that upon a *de novo* determination he "would reach the same conclusions as the Magistrate regarding the matters to which there has been objection." This confirmation of the discharge of his responsibilities, as he had originally exercised them under subsection 636(b)(1) when he first adopted the proposed findings, eliminates all question as to the validity of the findings.

3. *Waiver of Jury Trial.* McCarthy contends that he was entitled to a jury trial and never waived this right. The District Judge denied McCarthy a jury on the ground that he had not made a timely demand, pointing out that the initial complaint did not claim a jury and that the second amended complaint, making the demand, added no new substantive allegations. The Civil Rules require a demand for jury trial on an issue no later than ten days "after the service of the last pleading directed to such issue." Fed. R. Civ. P. 38(b). Failure to make a timely demand constitutes a waiver. *Id.* 38(d). However, "the last pleading directed to" an issue is not the pleading that raises the issue, it is the pleading that contests the issue. Normally, that pleading is an answer, or, with respect to a counterclaim, a reply, *id.* Rule 12(a); *see* 5 *Moore's Federal Practice* ¶ 38.39[2], at 38-367 (2d ed. 1988). In this case, no answer was filed to either the original complaint or the

first amended complaint. The answer to the second amended complaint was not filed until August 26, 1985, after plaintiff had made a jury demand. There was thus no waiver by reason of a late demand.

Nor, as the defendants contend, relying on *Lovelace v. Dall*, 820 F.2d 223, 227-29 (7th Cir. 1987), was there a waiver because McCarthy did not object to proceeding without a jury at the start of the hearing before the Magistrate. *See also Royal American Managers, Inc. v. IRC Holding Corp.*, 885 F.2d 1011, 1018-19 (2d Cir. 1989). *Lovelace* deemed the plaintiff to have acceded to a bench trial by not objecting at its start, but the case differs significantly from ours because the issue of entitlement to a jury was never litigated. By contrast, McCarthy's jury claim was challenged by the defendants and adjudicated by the District Court. Once that adverse ruling was made, McCarthy was not required to renew his jury demand at the start of the Magistrate's hearing in 1988.

Nevertheless, the defendants are correct in urging that McCarthy waived entitlement to a jury in the proceedings before the Magistrate in 1985 when he consented to proceeding under subsection 636(c). At that time, the Magistrate explained to McCarthy in open court that the proceedings would be conducted at the prison as a bench trial without a jury. With that understanding, McCarthy agreed to the subsection 636(c) procedure. This agreement was consent to a non-jury trial under Rule 39(a). The fact that the Magistrate, three years later, permitted McCarthy to renege on his agreement to have the issues tried by the Magistrate under subsection 636(c) and instead made recommended findings subject to *de novo* review by the District Judge under subsection

636(b)(1) does not undermine the waiver of a jury. McCarthy, though not entitled to any change, succeeded in changing the identity of the judicial officer with final fact-finding responsibility; he did not thereby rescind his consent to have the facts found by a judicial officer.

Nor is the waiver invalid because it occurred prior to the defendants' answer. There is no starting time for jury waivers. They may be agreed to even before a lawsuit arises. *See Rodenbur v. Kaufmann*, 320 F.2d 679, 683-84 (D.C. Cir. 1963). Though a litigant might have a basis for obtaining relief from a jury waiver where a subsequent pleading alters the nature of the issue to be decided from what it appeared to be at the time of the waiver, the defendants' answer here had no such effect.

4. *Free Transcript.* Judge Cabranes denied plaintiff's request for a free transcript of the hearing before the Magistrate, relying on 28 U.S.C. § 753(f) (free transcripts not required where issues frivolous). Though the procedural issues in this case are not frivolous, their resolution does not require examination of the evidence presented at the hearing before the Magistrate, and it was not error to deny McCarthy a free copy of the transcript of that hearing.

5. *Fact-finding.* McCarthy's challenge to the fact-finding is without substance. He contends that prison officers planted a knife in his cell as a pretext to remove him. The Magistrate and the District Judge were entitled to reject this claim.

We have considered McCarthy's remaining contentions and find them without merit. The judgment of the District Court is affirmed.

720—6-26-90 • USCA—80004 FY90

ORIGINAL

No. 90-5635

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1990

JOHN J. MCCARTHY,

Petitioner,

v.

GEORGE BRONSON, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Pursuant to Supreme Court Rules 15.7 and 39, petitioner submits this supplemental brief calling the Court's attention to a recent decision issued since the filing of his pro se petition for a writ of certiorari. In Clark v. Poulton, et al., No. 88-1177 (10th Cir. Sept. 21, 1990), the United States Court of Appeals for the Tenth Circuit expressly rejected the holding and reasoning of the Second Circuit in McCarthy v. Bronson, 906 F.2d 835 (2d Cir. 1990), the decision below.[2] More generally, the Clark court noted an intercircuit conflict on whether, under the Federal Magistrates Act, 28 U.S.C. § 636(b)(1)(B), a prisoner may be required to pursue a § 1983 "excessive-force" claim before a magistrate rather than directly in district court. Because at least six courts of appeals have now addressed this question and reached sharply divergent results, the Court should grant the petition to resolve this recurrent and important issue of federal law.

STATEMENT

This case involves a § 1983 action against a prison warden and several prison guards. Petitioner alleged that the defendants unlawfully sprayed him with tear gas, removed him from his cell, and otherwise used excessive force against him. The district court initially referred the case to a magistrate under 28 U.S.C. §§ 636(b)(1)(A) & (B), which authorize a judge, without the parties' consent, to designate a magistrate to handle certain pretrial matters. Thereafter, the parties consented, pursuant to 28 U.S.C. § 636(c), to have the entire case tried before the magistrate. At the start of the trial, however, petitioner sought leave to withdraw his consent, and the magistrate permitted him to do so. 906 F.2d at 838; see also 28 U.S.C. § 636(c)(6).

1 The Clark and McCarthy opinions are reproduced in an appendix to this brief.

Despite this development, the magistrate proceeded to conduct an eight-day bench trial, relying on the authority of 28 U.S.C. § 636(b)(1)(B). 906 F.2d at 839. Under § 636(b)(1)(B), a judge may designate a magistrate "to conduct hearings, including evidentiary hearings, and to submit to a judge . . . proposed findings of fact and recommendations for the disposition . . . of prisoner petitions challenging conditions of confinement." (Emphasis supplied.) At the close of trial, the magistrate issued his "Recommended Findings of Fact and Memorandum of Decision," see Pet. App. F, which found in favor of defendants on all of petitioner's claims and which the district judge subsequently endorsed. 906 F.2d at 838.

On appeal, the Second Circuit affirmed. In holding that the magistrate possessed the authority to try the case under 28 U.S.C. § 636(b)(1)(B), the court acknowledged that the case was "complicated by some uncertainties as to [this] authority," id. at 837, particularly with regard to "whether McCarthy's lawsuit is a petition 'challenging the conditions of confinement' within the meaning of subsection 636(b)(1)(B)." Id. at 839. Noting that the circuits were divided on the meaning of this subsection, the Second Circuit rejected the several opinions that had interpreted the phrase "conditions of confinement" to include "only challenges to pervasive prison conditions and [not] claims concerning specific episodes of misconduct by prison officials." Ibid. (rejecting Houghton v. Osborne, 834 F.2d 745 (9th Cir. 1987) and Hill v. Jenkins, 603 F.2d 1256, 1259 (7th Cir. 1979)

(Swygert, J., concurring)). Instead, the Second Circuit aligned itself with those decisions that "have construed the phrase ['conditions of confinement'] broadly to include almost any complaint made by a prisoner against prison officials." Ibid. (citing Branch v. Martin, 886 F.2d 1043, 1045 n.1 (8th Cir. 1989)). Under the latter interpretation, the Second Circuit concluded, McCarthy's allegation of a specific episode of unconstitutional conduct by prison officials qualified as a petition "challenging the conditions of confinement," thereby authorizing the magistrate to conduct McCarthy's trial despite his lack of consent.

ARGUMENT

I. The Tenth Circuit's Intervening Decision in Clark Exacerbates the Intercircuit Conflict Noted in the Petition.

The decision in Clark v. Poulton highlights the division among the courts of appeals on the precise question presented in this petition. In Clark, a divided panel of the Tenth Circuit specifically disagreed with the Second Circuit's interpretation of subsection 636(b)(1)(B). The Tenth Circuit relied on the "plain and commonly understood meaning of the word 'condition,'" a term that "clearly connotes an ongoing situation as opposed to an isolated incident." Slip op. at 9; see also id. ("'Condition' is defined as 'existing state of affairs,' and 'a mode or state of being.'") (quoting Webster's hird New International Dictionary 473 (1981)). In so ruling, the court specifically

adopted Judge Swygert's view that "conditions of confinement" encompasses "'ongoing prison practices and regulations with regard to matters such as placement in maximum security, deadlocks, unhealthy living conditions, unnecessary exposure to violence-prone inmates, overcrowded physical conditions, and cruel or unusual punishment by prison authorities." Id. at 7-8 (quoting Hill v. Jenkins, 603 F.2d at 1260). Since the prisoner's claims in Clark were based upon "two separate incidents of excessive force," id. at 2, the court concluded that they did not fall within § 636(b)(1)(B) and the magistrate therefore lacked jurisdiction to hear the claims without the prisoner's consent.[2]

With its decision in Clark, the Tenth Circuit has now joined the Fourth, Ninth and Eleventh Circuits in reading § 636(b)(1)(B) to authorize nonconsensual referral of a prisoner petition to a magistrate only where the petition challenges pervasive or ongoing prison practices or regulations. In contrast, the Second and Eighth Circuits have rejected that limitation, ruling that virtually any prisoner suit under 42 U.S.C. § 1983 qualifies as a "prisoner petition[] challenging the conditions of confinement." 28 U.S.C. § 636(b)(1)(B). As this

2 The court noted in addition "that one of Clark's excessive force claims arises from an alleged incident occurring before he was jailed and involving his probation officer," and concluded that "[t]his claim indisputably does not challenge a condition of confinement even under the dissent's broad construction of that term." Slip op. at 10 (emphasis in original).

division demonstrates, the question presented in this petition is of recurring importance to the disposition of prisoner litigation in the federal judicial system and, for that reason alone, warrants review in this Court.[3]

II. The Decision Below Was Incorrect.

As the decision in Clark demonstrates, the Second Circuit erred in construing § 636(b)(1)(B) as it did. By declining to follow the plain meaning of the statutory language, the opinion below deviated from the "general rule of statutory construction [that] where the terms of a statute are unambiguous, judicial inquiry is complete." Adams Fruit Co. v. Barrett, 110 S. Ct. 1384, 1387 (1990).[4] Instead, the Second Circuit relied on a reference to 42 U.S.C. § 1983 in the legislative history, inferring from it that Congress employed the phrase "prisoner petitions challenging the conditions of confinement" in §

3 Perhaps out of a recognition that issues involving the meaning of the Federal Magistrates Act affect a large number of cases in the federal courts, this Court has frequently clarified the meaning of that statute in recent years. See, e.g., United States v. France, 886 F.2d 223 (9th Cir. 1989), cert. granted, 110 S. Ct. 1921 (1990); Gomez v. United States, 109 S. Ct. 2237 (1989) (resolving "important conflict" between Second and Fifth Circuits on meaning of "additional duties" clause of 28 U.S.C. § 636(b)(3)); Thomas v. Arn, 474 U.S. 140 (1985).

4 As the Tenth Circuit pointed out, a "condition" is an ongoing or widespread practice or situation. Cf. Rhodes v. Chapman, 452 U.S. 337 (1981); Bell v. Wolfish, 441 U.S. 520 (1979).

636(b)(1)(B) to signify all § 1983 actions brought by prisoners.[5] Even assuming that resort to legislative history were appropriate, the Second Circuit's reliance on the references to § 1983 was misplaced. Many such actions brought by prisoners have nothing at all to do with "conditions of confinement," as when a prisoner sues a police officer for pre-conviction conduct.[6] What is more, even the narrower category of § 1983 prisoner suits against prison officials cannot be coextensive with the "prisoner petitions" clause of § 636(b)(1)(B). That category would exclude a prisoner's tort action for widespread food poisoning brought against a private company operating a prison cafeteria, even though such a lawsuit would surely challenge the prisoner's "conditions of confinement." It would also exclude virtually all suits brought by federal prisoners challenging the conditions of confinement in federal prisons, since § 1983 actions require the

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5 The Second Circuit concluded that "Congress evidently wished magistrates to assist district judges with respect to all prisoner claims and selected phrases to describe the two broad categories of prisoner claims cognizable under 28 U.S.C. §§ 2254, 2255 (challenges to convictions) and 42 U.S.C. § 1983 (challenges to conditions of confinement)." 906 F.2d at 839 (emphasis added). See also Clark, slip op. (dissent) at 2 (per Anderson, J.) (citing references in legislative history to § 1983).

6 Indeed, the Second Circuit acknowledged this lack of congruence sub silentio by suggesting that, in order to fall within § 636(b)(1)(B), a § 1983 complaint must be "made by a prisoner against prison officials." 906 F.2d at 839 (emphasis supplied). There is nothing in 28 U.S.C. § 636(b)(1)(B), however, to suggest that only prisoner petitions directed against certain types of parties may be referred to a magistrate without the prisoner's consent. Instead, the subsection clearly targets those prisoner complaints that advance a certain kind of allegation.

deprivation of federal rights by persons acting under color of state law. Thus, contrary to the Second Circuit's view, Congress simply could not have intended § 636(b)(1)(B) to be coextensive with all § 1983 prisoner actions against prison officials.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

JAMES EDWARD CLARK,

Plaintiff-Apppellant,

v.

ROBERT POULTON, UTAH STATE CORRECTIONS DEPARTMENT, DAVID JORGENSON, SALT LAKE COUNTY SHERIFF'S OFFICE, and JOHN DOES I through X,

Defendant-Appellees.

No. 88-1177

Appeal from the United States District Court
for the District of Utah
(D.C. No. 86-C-0396W)

Janice M. Church, Holme Roberts & Owen (Jeffrey A. Chase with her on the brief), Denver, Colorado, Attorneys for Plaintiff-Appellant.

Jerry G. Campbell, Deputy County Attorney (David E. Yocom, Salt Lake County Attorney, with him on the brief), Salt Lake City, Utah, for Salt Lake County Defendant-Appellees.

Brent A. Burnett, Assistant Attorney General (R. Paul Van Dam, Attorney General, David L. Wilkinson, Attorney General, Stephen J. Sorenson, Asst. Attorney General, and William F. Bannon, Asst. Attorney General with him on the brief), Salt Lake City, Utah, for Defendant-Appellees Robert Poulton and Utah State Corrections Department.

Before HOLLOWAY, SEYMOUR, and ANDERSON, Circuit Judges.

SEYMOUR, Circuit Judge.

James E. Clark brought this suit under 42 U.S.C. § 1983 (1982) against the Adult Parole Division of the Utah State Corrections Department, parole officer Robert Poulton, the Salt Lake County jail, and David Jorgenson, a transportation officer employed at the jail. Clark alleged that his constitutional rights were violated by two separate incidents of excessive force, and by the denial of medical treatment and of reasonable access to the mails during his pretrial detention in the jail. The district court referred the case to a magistrate pursuant to 28 U.S.C. § 636(b)(1)(B)(1988). The magistrate held an evidentiary hearing and submitted a report recommending that Clark's claims be dismissed. The district court adopted this report and entered judgment accordingly. Clark appeals, asserting that the magistrate had no jurisdiction because the referral was not authorized by statute, that in any event the district court failed to conduct a proper de novo review of the portion of the report to which Clark had objected, and that the magistrate erred in his application of the law. We conclude that the magistrate was without jurisdiction, and we therefore reverse.

I.

BACKGROUND

The relevant facts are briefly as follows. While on parole following state court convictions, Clark returned to Salt Lake

City after an out-of-state visit approved by his parole officer, Poulton, and learned that the police were looking for him in connection with two armed robberies. The day after Clark returned, he reported to Poulton at the Salt Lake County Parole office. Poulton arrested him on suspicion of the armed robberies, handcuffed him, and took him down the hall to be booked. When Clark objected during the booking to being photographed without an attorney, Poulton allegedly pushed Clark against the wall and lifted his handcuffed arms over his head, aggravating a previous back injury. Following his transportation to the jail, Clark purportedly did not receive requested medical treatment for his back for several weeks.

While detained in the jail, Clark and several other inmates were transported to court by Jorgenson. On leaving the courtroom, Clark asked to use the restroom and Jorgenson told him he would have to wait. Because of previous surgery, waiting was difficult and uncomfortable for Clark and he later doubled over in the courthouse elevator. Jorgenson allegedly grabbed Clark's neck and chest and pushed him into the elevator wall, again aggravating his back injury. Clark required physical therapy for a year after his release from jail and sought recovery of these medical expenses as part of his damages.[1]

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[1] Clark spent nine months in the jail pending disposition of the charges against him, one of which was dismissed after his acquittal on the other. During his incarceration, his truck was repossessed, and he could not attend school for which he had

Clark's original complaint was filed May 12, 1986. On May 14, the district court entered an order of reference which stated:

> "IT IS ORDERED that as authorized by 28 U.S.C. § 636(b)(1)(B) and the rules of this court the above entitled case is referred to the magistrate. He is directed to manage the case, to receive all motions filed, hear oral arguments hereon, to conduct evidentiary hearings when proper and make proposed findings of fact, and to submit to the undersigned judge a report and recommendation for the proper resolution of dispositive matters presented."

Rec., vol. I, doc. 2. Pursuant to the order, the magistrate thereafter determined that Clark could proceed in forma pauperis, appointed him counsel, held scheduling and pretrial conferences, conducted an evidentiary hearing (described in the relevant documents as a trial), and issued a report recommending that Clark's claims be dismissed. Clark objected to the report, which the district court summarily adopted in all respects.

II.

REFERENCE TO A MAGISTRATE

We begin our analysis of this issue by examining the jurisdiction and powers of a federal magistrate set out in 28

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already paid tuition. Because of this loss of student status, he also lost the deferral of his student loan repayment. In addition to his medical expenses, Clark sought recovery for these losses, as well as injunctive relief relating to his parole and to the jail's magazine subscription policy. We express no opinion on the relief Clark seeks.

U.S.C. § 636 (1988). Under section 636(b)(1)(A), a judge may designate a magistrate to hear and determine all pretrial matters except for those dispositive motions specifically listed therein.[2] The district court reviews a section 636(b)(1)(A) determination under the same standard that an appeals court applies to a district court determination, ascertaining whether the "order is clearly erroneous or contrary to law." Id.

Under section 636(b)(1)(B), the provision which the district court invoked in this case, a magistrate may be designated to conduct evidentiary hearings and submit reports and recommendations in three types of proceedings: 1) hearings on those dispositive motions excepted in section 636(b)(1)(A); 2) applications by criminal defendants for posttrial relief; and 3) prisoner petitions challenging conditions of confinement.[3] Upon

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[2] Section 636(b)(1)(A) provides:

> "[A] judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action."

28 U.S.C. § 636(b)(1)(A).

[3] Section 636(b)(1)(B) provides:

> "[A] judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the

the objection by a party to the magistrate's proposed findings and recommendations under this section, the district court is required to make a de novo determination. Id.

Section 636(b)(2) allows a judge to appoint a magistrate to serve as a special master, either pursuant to the Federal Rules of Civil Procedure or, upon consent of the parties, without regard to Rule 53(b) of the Federal Rules of Civil Procedure. Section 636(b)(3) provides that "[a] magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States." 28 U.S.C. § 636(b)(3).

Finally, section 636(c)(1) provides that a magistrate "[u]pon consent of the parties . . . may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves." 28 U.S.C. § 636(c)(1) (emphasis added). Section 636(c)(2) sets out specific requirements regarding such consent:

> "If a magistrate is designated to exercise civil jurisdiction under paragraph (1) of this subsection, the clerk of court shall, at the time the action is filed, notify the parties of their right to consent to the exercise of such jurisdiction. The decision of the parties shall be communicated to the clerk of court. Thereafter, neither the district judge nor the magistrate shall attempt to persuade or induce any party to consent to reference of any civil matter to a magistrate. Rules of court for the reference of civil matters to magistrates shall include procedures to protect the voluntariness of the parties' consent."

28 U.S.C. § 636(c)(2) (emphasis added). A judgment entered pursuant to Section 636(c)(1) may be appealed either to the court of appeals or to the district court, in the same manner as a district court judgment would be appealed to a court of appeals.[4]

A. Authorization

As we have noted, the district court here stated that the order of reference was made under section 636(b)(1)(B), which applies to hearings on certain dispositive motions, applications for post-conviction relief, and prisoner petitions challenging conditions of confinement. Since no dispositive motion was filed below, and since Clark was not seeking post-conviction relief, the only arguably applicable provision is the one allowing reference of prisoner challenges to conditions of confinement.

Conditions of confinement have been described as "ongoing prison practices and regulations with regard to matters such as

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> court, of any motion excepted in subparagraph (A), of applications for posttrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement."

28 U.S.C. § 636(b)(1)(B).

[4] In addition to the provisions discussed above, section 636(a)(3) grants magistrates the power to conduct trials under 18 U.S.C. § 3401 (1988). Section 3401 gives a magistrate jurisdiction to try and sentence defendants accused of misdemeanors upon special designation by the district court and the written consent of the defendant.

placement in maximum security, deadlocks, unhealthy living conditions, unnecessary exposure to violence-prone inmates, overcrowded physical environments, and cruel or unusual punishment by prison authorities." Hill v. Jenkins, 603 F.2d, 1256, 1260 (7th Cir. 1979) (Swygert, J., concurring). Such ongoing practices do not include "a single incident that occurred in the prison." Id. (concurring on ground that loss of property from prison shakedown not condition of confinement). The above definition has been generally accepted by those courts addressing the issue. See, e.g., Houghton v. Osborne, 834 F.2d 745, 749 (9th Cir. 1987); Hall v. Sharpe, 812 F.2d 644, 647 n.1 (11th Cir. 1987); Wimmer v. Cook, 774 F.2d 68, 74 n.9 (4th Cir. 1985); Orpiano v. Johnson, 687 F.2d 44, 47 (4th Cir. 1982); but see McCarthy v. Brown, 906 F.2d 835, 839 (2d Cir. 1990). This definition, which we likewise adopt, does not encompass the two instances of the use of excessive force alleged by Clark. Those incidents, one of which occurred before Clark was even admitted to the jail, are clearly isolated events rather than part of a series of ongoing jail practices. Accordingly, the reference to the magistrate of the claims is not authorized by section 636(b)(1)(B).

The dissent's characterization of our construction of "conditions of confinement" as unsupported by reason or authority is simply wrong. As the dissent recognizes, only two circuits have reached decisions contrary to the construction we adopt in this opinion, and only one of those circuits has explicitly

disagreed with it. See McCarthy, 906 F.2d at 839. The court in McCarthy relied on Branch v. Martin, 886 F.2d 1043 (8th Cir. 1989), in which the court noted in passing that "[t]he term 'conditions of confinement' has been interpreted expansively to include almost any prisoner § 1983 action challenging 'the type of confinement, and matters concerning health, safety, or punishment.'" 886 F.2d at 1045 n.1 (quoting Houghton v. Osborne, 834 F.2d 745, 749-50 (9th Cir. 1987), and citing additional cases). However, the cases cited in Branch do not support McCarthy's holding because they involve claims falling within our construction of the statute, with the exception of Archie v. Christian, 808 F.2d 1132 (5th Cir. 1987), which does not describe the challenged conduct, and Cay v. Estelle, 789 F.2d 318 (5th Cir. 1986), which does not address the condition-of-confinement issue.

Moreover, our construction is grounded, as it must be, on the plain and commonly understood meaning of the word "condition." See Perrin v. United States, 444 U.S. 37, 42 (1979) ("A fundamental canon of construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning."). "Condition" is defined as "existing state of affairs," and "a mode or state of being." Webster's Third New International Dictionary 473 (1981). The word thus clearly connotes an ongoing situation as opposed to an isolated incident. The court in McCarthy and the dissent here improperly defend their refusal to give effect to this plain

meaning as justified by Congressional policy. The law, however, is to the contrary. "[I]t should be generally assumed that Congress expresses its purposes through the ordinary meaning of the words it uses." Escondido Mut. Water Co. v. La Jolla Band of Mission Indians, 466 U.S. 765, 772 (1984).

Finally, we note that one of Clark's excessive force claims arises from an alleged incident occurring before he was jailed and involving his probation officer. This claim indisputably does not challenge a condition of confinement even under the dissent's broad construction of that term.

Nor is the reference authorized under section 636(b)(3), which permits assignment to the magistrate of additional duties not inconsistent with the Constitution and federal law. This conclusion is compelled by the Supreme Court's analysis in Gomez v. United States, 109 S. Ct. 2237 (1989), in which the Court considered the scope of section 636(b)(3). In Gomez, a magistrate had empaneled a jury in a felony trial over the objection of the defendants. In reversing the defendants' convictions, the Supreme Court concluded that the additional-duties clause, when considered in the context of the overall statutory scheme, does not encompass the seating of a jury in a felony trial.

In reaching this conclusion, the Court relied upon two established canons of statutory construction which apply with

equal force in the instant case. First, the Court followed its "settled policy to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question." Id. at 2241. The Court thus obviated the need to consider the constitutionality of assigning felony jury selection to a magistrate under section 636(b)(3) by determining that section 636(b)(3) itself did not authorize such an assignment. In so doing, the Court applied a second principle, stating that in interpreting a statute a court must not be "'guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.'" Id. (quoting Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 51 (1987)). The Court then reviewed the Act as a whole in light of its evolution and legislative history and concluded that while a literal reading of section 636(b)(3) in isolation would encompass the assignment of the duties at issue, "the carefully defined grant of authority to conduct trials of civil matters and of minor criminal cases should be construed as an implicit withholding of the authority to preside at a felony trial." Id. at 2245.

Applying these principles to the instant facts, we hold that section 636(b)(3) does not authorize a district court to designate a magistrate to conduct a hearing on a prisoner's petition that does not challenge a condition of confinement. Gomez precludes both construing section 636(b)(3) in isolation, and upholding the

assignment of additional duties on constitutional grounds without first ascertaining whether the assignment is authorized by the statute when considered as a whole. Here, section 636(b)(1)(B) carefully limits a magistrate's authority to conduct hearings on prisoner petitions, extending that authority only to petitions challenging conditions of confinement. Under Gomez, this articulation of specific duties must be construed as implicitly withholding other duties not so specified, particularly when, as here, the contrary construction would in effect render the specific limitations a nullity.[5] See Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana, 472 U.S. 237, 249 (1985) ("elementary canon of construction that a statute should be interpreted so as not to render one part inoperative").

Defendants argue on appeal that the reference can be upheld under section 636(c). We disagree. While section 636(c) permits a magistrate to conduct a trial in a civil matter, neither the district court nor the magistrate here purported to act pursuant to that provision. Moreover, magistrate jurisdiction to proceed

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5 The dissent cites Marvel v. United States, 719 F.2d 1507 (10th Cir. 1983), for the proposition that "the majority's construction of the statute does not avoid deciding a constitutional issue, for this court has already held that Article III allows a magistrate to preside over a civil matter so long as the district court reviews the matter de novo." Dissent at 4 n.2. Marvel is totally inapposite inasmuch as the parties there consented to trial before the magistrate. See 719 F.2d at 1512 ("[W]e hold there is ample statutory authority under 28 U.S.C. § 636(b)(2) to refer a civil case to a federal magistrate for trial on the merits, provided the parties consent to such a procedure.")

under section 636(c) requires a special designation by the district court, id. § 636(c)(1), and the consent of the parties communicated to the clerk of court, id, § 636(c)(2), neither of which is present here.[6] In finding the prerequisites for magistrate jurisdiction under section 636(c) lacking here, we join the great weight of authority and hold that consent under section 636(c)(2) must be explicit and cannot be inferred from the conduct of the parties. See Securities & Exchange Comm'n v. American Principals Holdings (In re San Vicente Medical Partners Ltd.), 865 F.2d 1128 (9th Cir. 1989); Silberstein v. Silberstein, 859 F.2d 40 (7th Cir. 1988); Hall v. Sharpe, 812 F.2d at 647; Wimmer, 774 F.2d at 76; Ambrose v. Welch, 729 F.2d 1084 (6th Cir. 1984); but see Archie v. Christian, 808 F.2d 1132 (5th Cir. 1987)(en banc).

B. Jurisdiction

Given our conclusion that the reference was unauthorized, we must consider the significance, if any, of Clark's failure to object to proceeding before the magistrate. The majority of circuits that considered the issue prior to the Gomez decision

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6 Section 636(c)(2) also states that "[r]ules of court for the reference of civil matters to magistrates shall include procedures to protect the voluntariness of the parties' consent." Our examination of the Civil Rules of Practice of the United States District Court for the District of Utah reveals no provision for the reference of civil trials to a magistrate. To the contrary, magistrates do not generally even conduct final pre-trial conferences, see Rule 9(d), and are specifically precluded from entering any order dispositive of a substantive issue in the case, see Rule 9(i).

concluded that an improper reference is a matter of jurisdiction and therefore not subject to waiver or harmless-error analysis.

For example, in Houghton v. Osborne, 834 F.2d 745, the Ninth Circuit considered facts closely analogous to those before us. There the district court had referred a prisoner's civil rights action to a magistrate, who held an evidentiary hearing on the merits of the claim and filed proposed findings and recommendations that were adopted by the district court. On appeal, the court held sua sponte that the prisoner's claim did not challenge a condition of confinement, and that the district court therefore "lacked the jurisdiction to refer this matter to the magistrate to conduct an evidentiary hearing on the merits of Houghton's 1983 action." Id. at 750. Similarly, in Hall the district court purported to refer a prisoner's civil rights suit to a magistrate under sections 636(b)(1) and (b)(3) for a trial before an advisory jury. The magistrate issued a report recommending acceptance of the jury verdict, which the district court adopted in entering final judgment against the plaintiff. On appeal, the Eleventh Circuit concluded that "the district court's referral of this case was not authorized by any provision of the Magistrate's Act, 28 U.S.C. § 636, and thus the magistrate was without jurisdiction to conduct the trial." 812 F.2d at 646; see also Lovelace v. Dall, 820 F.2d 223 (7th Cir. 1987)(per curiam) (unambiguous consent of parties required for magistrate to have jurisdiction to enter final judgment under section 636(c));

Frank v. Arnold (In re Morrissey), 717 F.2d [illegible] (3d Cir. 1983) (magistrate had no jurisdiction to hear appeal from bankruptcy court order notwithstanding parties' express consent); Taylor v. Oxford, 575 F.2d 152 (7th Cir. 1978) (magistrate had no jurisdiction over motion to dismiss for failure to state claim referred under section 636(b)(3) for final disposition pursuant to parties' stipulation and local rule); but see Archie v. Christian, 808 F.2d 1132, at 1134-35 (5th Cir. 1987)(en banc) (improper reference under sections 636(b)(1)(B) and (b)(3) matter of procedure rather than jurisdiction).[7]

In Gomez, the defendants had objected to the assignment to the magistrate, but they made no special claim of prejudice on appeal and the government therefore contended that the error was harmless. The Supreme Court rejected this argument, stating that "harmless-error analysis does not apply in a felony case in which, despite the defendant's objection and without any meaningful review by a district judge, an officer exceeds his jurisdiction by selecting a jury." 109 S. Ct. at 2248 (emphasis added).

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[7] The dissent asserts that our reliance on Houghton, Lovelace, and In re Morrissey is questionable because those cases do not specifically address the failure to object to an unauthorized reference. The short answer to the dissent's objection is that a determination that the issue is jurisdictional simply obviates the need to address a failure to object. Lack of subject-matter jurisdiction renders lack of objection irrelevant. See, e.g., 15 C. Wright, A. Miller & E. Cooper, Federal Practice & Procedure § 3801 at 7 (2d ed. 1986) (subject matter jurisdiction cannot be waived by the parties).

Notwithstanding this language, courts subsequent to Gomez have varied in their assessment of the relevance of that opinion to cases in which the defendant did not object to the magistrate's unauthorized acts. In United States v. Mang Sun Wong, 884 F.2d 1537, 1544-46 (2d Cir. 1989) (order on petition for rehearing), cert. denied, 110 S. Ct. 1140 (1990), a majority of the panel distinguished Gomez, read it narrowly, and held without analyzing the jurisdictional issue that Gomez does not require reversal when the defendant consented to the magistrate's improper exercise of power. Judge Altimari dissented, concluding that the issue is one of jurisdiction, and that consent is therefore irrelevant because it "cannot enlarge those powers of office not granted by the Federal Magistrates Act." Id. at 1546. See also United States v. Mussacchia, 900 F.2d 493 (2d Cir. 1990)(following Mang Sun Wong, one judge dissenting).

In United States v. France, 886 F.2d 223 (9th Cir. 1989), cert. granted, 110 S. Ct. 1921 (1990), however, the court held Gomez applicable to all cases pending on direct appeal, including those in which the defendant did not object to the magistrate's jury selection. The court did not address the jurisdictional issue, grounding its decision intead on its conclusion that Gomez announced a new rule appropriate for retroactive application, and that under Ninth Circuit precedent France had not waived his entitlement to the rule by failing to object at trial. The court did emphasize several times the Supreme Court's references in

Gomez to tne magistrate's lack of "jurisdict n" and "power." Id. at 226 & n.1.

In United States v. Wey, 895 F.2d 429 (7th Cir. 1990), the Seventh Circuit held that subject matter jurisdiction is not involved and that the unauthorized exercise of power was therefore subject to waiver. The case is thus contrary to the Seventh Circuit's decisions in Lovelace, 820 F.2d at 225-26 & n.3, and Taylor, 575 F.2d at 154, in which the court held that the magistrate's power under the Act is a matter of jurisdiction and that the parties cannot confer jurisdiction which the magistrate does not possess by failing to object. The court in Wey relied in part on the First Circuit decision in United States v. Lopez-Pena, 890 F.2d 490 (1st Cir. 1989), which was withdrawn upon the grant of rehearing en banc.

In its subsequent en banc opinion, the First Circuit emphasized the jurisdictional language in Gomez, and then agreed with France, 886 F.2d 223, that Gomez must be applied where the magistrate was permitted to empanel the jury, notwithstanding the failure to object. See United States v. Martinez-Torres, ___ F.2d ___, Nos. 87-2006, 87-2007, 87-2008 (1st Cir. Aug. 20, 1990). In so doing, the First Circuit expressly disapproved of the opinions in Wey and Mang Sun Wong, and criticized the discussion of consent in Virgin Islands v. Williams, 892 F.2d 305, 309-12 (3d Cir. 1989), cert. denied, 110 S. Ct. 2211 (1990).

We also disagree with the analysis in Williams. There, the court appeared to hold that the issue of the magistrate's power is a jurisdictional matter but nonetheless is subject to waiver. In so doing, the court construed section 636(b)(3) in isolation in direct contradiction to the analysis in Gomez, held that the section authorizes the very reference Gomez specifically held to be unauthorized, and then decided the constitutional issue Gomez deliberately avoided. The concurrence in Williams concluded that, although the magistrate's power raises an issue of jurisdiction, Gomez does not preclude plain error analysis, and the magistrate's unauthorized exercise of power was not plain error.

In our view, the Supreme Court's language and analysis in Gomez, and the language of the Act itself, compel the conclusion that a magistrate's power under the Act is a jurisdictional issue not subject to waiver. The Act speaks in terms of a magistrate's exercise of jurisdiction, see 28 U.S.C. §§ 636(c)(1) and (2), and Gomez repeatedly refers to a magistrate's jurisdiction. In Parts III and IV of Gomez, the Court traced the evolution of the powers of federal magistrates and reviewed the current authority conferred by the Federal Magistrates Act of 1979. See 109 S. Ct. at 2242-47. That discussion is couched in terms of Congressional grants of and limitations upon jurisdiction.

The court in Wey discounted the obvious impact of the use of the term "jurisdiction" by Congress and the Supreme Court. Instead, the court adopted a plain error rule, observing that although the magistrate's conduct at issue was unauthorized, the district court had subject matter jurisdiction under the relevant jurisdictional statutes. This result ignores the fact that while the limitations in the Magistrate Act do restrict a magistrate's authority to act in a case properly before the district court, the Act also restricts the district court's power to refer a matter to a magistrate. Congressionally imposed limits on the exercise of judicial power other than the delineation of subject matter jurisdiction are nonetheless jurisdictional. See Lauf v. E. G. Shinner & Co., 303 U.S. 323, 330 (1938); 13 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3526 at 227-28 (2d ed. 1984).

> "[T]he jurisdiction of a magistrate to decide a case is not based solely on the consent of the parties, but derives from a proper designation by the district court. Because district court jurisdiction is statutory, its ability to make a proper designation of, and thereby to confer jurisdiction on, a magistrate is also a creature of statute."

In re Morrissey, 717 F.2d at 102.

We simply cannot accept an analysis under which parties by their conduct may extend the jurisdiction of both the magistrate and the district court beyond that established by Congress. We

therefore hold that the magistrate in this case was without jurisdiction to hear the excessive force claims.[8]

III.

Accordingly, we vacate the judgment dismissing Clark's claims and remand to the district court for further proceeding consistent with this opinion.[9]

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[8] We recognize that two of Clark's claims, his allegations of denial of medical treatment while in the jail and his challenge to the jail magazine policy, do challenge conditions of confinement. However, those claims were consolidated by agreement of the parties with Clark's excessive force claims. Given our conclusion that the parties may not consent to the magistrate's exercise of a power withheld by Congress, the parties' consent here to consolidation cannot vest the magistrate with jurisdiction over claims not referable to him.

[9] We note Clark's argument that the district court did not make the required de novo review of those portions of the magistrate's report to which Clark objected. In view of our conclusion that this case must be remanded in any event, we need not address this argument other than to observe that our opinion in Gee v. Estes, 829 F.2d 1005, 1008-09 (10th Cir. 1987), is available for the guidance of the court on this issue on remand.

88-1177, Clark v. Poulton

ANDERSON, Circuit Judge, dissenting:

I respectfully dissent. The referral of this case to the magistrate was authorized by the statute. Furthermore, Clark waived his right to challenge the magistrate's authority by failing to object below. The judgment should be affirmed.

I.

A.

The referral was authorized by the provision in 28 U.S.C. § 636(b)(1)(B) for "prisoner petitions challenging conditions of confinement." The majority errs by adopting the narrow formulation of Judge Swygert's concurrence in Hill v. Jenkins, 603 F.2d 1256, 1259-60 (7th Cir. 1979), which is not supported by reason or authority.[1] This court should follow the two circuits which have interpreted section 636(b)(1)(B) to authorize the referral to a magistrate of prisoner suits complaining of specific incidents. See McCarthy v. Bronson, 906 F.2d 835, 839 (2d Cir. 1990);

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[1] Judge Swygert's concurrence cites no authority for his narrow construction of the statute, and the cases adopting his construction cite no authority other than the concurrence and the other cases adopting it.

In addition, it is not clear that the Eleventh Circuit agrees with Judge Swygert. Hall v. Sharpe, 812 F.2d 644, 647 n.1 (11th Cir. 1987), involved a complaint alleging a single incident, but the judgment below was reversed not because the incident was not a condition of confinement, but because section 636(b)(1)(B) does not authorize magistrates to preside over jury trials. Because the citation in Hall to Hill is dictum, "only two circuits," supra at ___, clearly interpret "conditions of confinement" to exclude single incidents.

Thompson v. Nix, 89[illegible].2d 356, 357 (8th Cir. 19); Branch v. Martin, 886 F.2d 1043, 1045 & n.1 (8th Cir. 1989).[2]

> "Subsection 636(b)(1)(B) was added in 1976 as part of a broadening of the authority of magistrates. Act of Oct. 21, 1976, Pub. L. 94-577, 90 Stat. 2729. The House Report does not explain the category 'prisoner petitions challenging conditions of confinement' but does refer to 'petitions under section 1983 of Title 42.' H.R. Rep. No. 1609, 94th Cong., 2d Sess. 11, reprinted in 1976 U.S. Code Cong. & Admin. News 6162, 6171. . . .
>
> We see no reason why a Magistrate with clear authority to hold hearings and recommend findings as to the unconstitutionality of continuing prison conditions may not perform a similar function as to specific episodes of unconstitutional conduct by prison officials. The phrase 'conditions of confinement' appears not to have been selected as a limitation to preclude episodes of misconduct, but rather as a generalized category covering all grievances occurring during prison confinement."

McCarthy v. Bronson, 906 F.2d at 839.

According to the majority, a suit alleging that a prisoner was beaten once must be heard by an Article III judge, but a claim that the prisoner is beaten daily may be referred to a magistrate. Limiting the magistrate's jurisdiction to the more serious claim

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[2] The majority's suggestion that the Eighth Circuit does not disagree with their interpretation of the statute is incorrect. That court has approved the referral to a magistrate, as "prisoner petitions challenging conditions of confinement," a claim that prison officials "assault[ed the plaintiff] on two occasions," Thompson v. Nix, 897 F.2d at 357, and a claim that "on September 10, 1986, when defendants escorted [plaintiff] from a waiting room to his cell, defendants used excessive force against him," Branch v. Martin, 886 F.2d at 1044. Moreover, some of the cases cited in Branch fall outside the majority's construction of the statute. The plaintiff in Gee v. Estes, 829 F.2d 1005, 1006 (10th Cir. 1987), alleged, inter alia, an incident where "he was dragged into court with no clothing on except an oversized pair of trousers which dropped to his knees to expose him to the spectators." The plaintiff in Cay v. Estelle, 789 F.2d 318, 319 (5th Cir. 1986), alleged "that on August 3, 1982, when [he] asked to be relieved from work duties because of a back injury, he was beaten severely . . . ."

makes no sense, and nothing in the legislative history persuades me that Congress intended such an anomaly. See Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 575 (1982) ("interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available"); American Tobacco Co. v. Patterson, 456 U.S. 63, 71 (1982) ("Statutes should be interpreted to avoid untenable distinctions and unreasonable results whenever possible."). Their interpretation conflicts with the legislative intention to give magistrates broad authority to assist judges. See H.R. Rep. No. 1609, 94th Cong., 2d Sess. 6-8, reprinted in 1976 U.S. Code Cong. & Admin. News 6162, 6166-68.

One of the incidents in this case occurred shortly after Clark was arrested. The other took place while he was in pretrial detention. At neither time was he free to leave. Certainly, he was in confinement.[3] See Wimmer v. Cook, 774 F.2d 68, 69, 74 (4th Cir. 1985) (pretrial detention); see also Worley v. Sharp, 724 F.2d 862, 863 (10th Cir. 1983) (same), reh'g denied, 759 F.2d 786 (10th Cir. 1985). Because his complaint challenged conditions of his confinement, section 636(b)(1)(B) authorized the referral.

B.

If the referral was not authorized by that subsection, it was authorized by section 636(b)(3). The articulation of specific

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[3] "Confinement" is the "[s]tate of being confined" or "shut in" "by either a moral or a physical restraint, by threats of violence with a present force, or by physical restraint of the person." Black's Law Dictionary 157 (abr. 5th ed. 1983).

duties in subsection (b)(1)(B) did not "implicitly withhold[] other duties not so specified . . . ." Supra at ___. Subsection (b)(3) is a "'catchall' provision." Garcia v. Boldin, 691 F.2d 1172, 1178 (5th Cir. 1982); accord, e.g., King v. Ionization Int'l, Inc., 825 F.2d 1180, 1185 (7th Cir. 1987). "Where the district court is not specifically empowered to refer a case, it may do so under the general provision of 28 U.S.C. § 636(b)(3) . . . ." Hall v. Vance, 887 F.2d 1041, 1046 (10th Cir. 1989).

In Mathews v. Weber, 423 U.S. 261 (1976), the Supreme Court reviewed the legislative history of the original Act:

> "The three examples § 636(b) sets out are, as the statute itself states, not exclusive. The Senate sponsor of the legislation, Senator Tydings, testified in the House hearings:
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> 'The Magistrate[s] Act specifies these three areas because they came up in our hearings and we thought they were areas in which the district courts might be able to benefit from the magistrate's services. We did not limit the courts to the areas mentioned. . . .
>
> 'We hope and think that innovative, imaginative judges who want to clean up their caseload backlog will utilize the U.S. magistrates in these areas and perhaps even come up with new areas to increase the efficiency of their courts.'"

Id. at 267 (quoting Hearings on the Federal Magistrates Act Before Subcomm. No. 4 of the House Comm. on the Judiciary, 90th Cong., 2d Sess. 81 (1968)). The legislative history of the 1976 amendments to the Act confirms the expansiveness of subsection (b)(3):

> "This subsection enables the district courts to continue innovative experimentations in the use of this judicial officer. At the same time, placing this authorization in an entirely separate subsection emphasizes that it is not restricted in any way by any other specific grant of authority to magistrates."

H.R. Rep. No. 1609, 94th Cong., 2d Sess. 5, reprinted in 1976 U.S. Code Cong. & Admin. News 6162, 6172 (emphasis added). The statutory authorization for referring to magistrates prisoner petitions challenging conditions of confinement was not meant as a bar to the referral of prisoner petitions unrelated to conditions of confinement.[4] See, e.g., John v. Louisiana, 899 F.2d 1441, 1446 (5th Cir. 1990) (subsection (b)(3) authorizes post-trial referral of sanctions question even though subsection (b)(1)(A) only refers to pretrial matters).

As is true of the majority's construction of subsection (b)(1)(B), their construction of subsection (b)(3) has absurd consequences. If (b)(3) only applies to matters not addressed in (b)(1), then a suit by a prisoner about something which preceded

[4] Gomez v. United States, 109 S. Ct. 2237 (1989), does not require a contrary conclusion. There, the Court concluded that "the carefully defined grant of authority to conduct trials of civil matters and of minor criminal cases should be construed as an implicit withholding of the authority to preside at a felony trial," id. at 2245, because

> "[w]hen a statute creates an office to which it assigns specific duties, those duties outline the attributes of the office. Any additional duties performed pursuant to a general authorization in the statute reasonably should bear some relation to the specified duties."

Id. at 2241. Presiding over a felony trial bears no relation to the duties specified in the statute, but presiding over a prisoner's section 1983 action does.

Also, unlike in Gomez, the majority's construction of the statute does not avoid deciding a constitutional issue, for this court has already held that Article III allows a magistrate to preside over a civil matter so long as the district court reviews the matter de novo. Marvel v. United States, 719 F.2d 1507, 1513 (10th Cir. 1983). (That the parties in that case consented to proceeding before the magistrate is irrelevant, for parties cannot expand Article III limitations on a tribunal's jurisdiction. Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 (1982).)

his confinement may not be referred to a magistrate (because it is "a prisoner's petition that does not challenge a condition of confinement," supra at ___) but a suit by a non-prisoner making an identical allegation may be.

II.

I also disagree with the majority's conclusion that the absence of statutory authorization for a magistrate's participation is a non-waivable jurisdictional defect. I would hold that the issue was waived by Clark's failure to object below.

The authority upon which the majority relies does not support its conclusion. Many of the cited cases do not address the effect of a failure to object to a referral to a magistrate. See Gomez v. United States, 109 S. Ct. 2237 (1989); Houghton v. Osborne, 834 F.2d 745 (9th Cir. 1987); Lovelace v. Dall, 820 F.2d 223 (7th Cir. 1987); In re Morrissey, 717 F.2d 100 (3d Cir. 1983). In the others, the failure to object was excused on grounds other than non-waivability. See United States v. Martinez-Torres, ___ F.2d ___, ___ & n.3, Nos. 87-2006, -2007, -2008 (1st Cir. Aug. 20, 1990) (objection would have been futile because of existing circuit authority); United States v. France, 886 F.2d 223, 228 (9th Cir. 1989) (same), cert. granted, 110 S. Ct. 1921 (U.S. 1990)[5]; Hall v. Sharpe, 812 F.2d 644, 649 (11th Cir. 1987) (appellant was allowed to rely upon the appellee's objection to proceeding before a magistrate). Taylor v. Oxford, 575 F.2d 152, 154-55 (7th Cir. 1978), appears to agree with the majority, but that opinion, as well as Lovelace v. Dall, 820 F.2d 223 (7th Cir. 1987), has been superseded by United States v. Wey, 895 F.2d 429 (7th Cir.), cert. denied, 110 S. Ct. 3283 (1990).[6]

The cases which consider the issue hold that a magistrate's lack of statutory authority is not a jurisdictional defect, so any objection is waived if not raised. See id. at 431; Mylett v. Jeane, 879 F.2d 1272, 1275 (5th Cir. 1989); United States v. Vanwort, 887 F.2d 375, 382-83 (2d Cir. 1989), cert. denied, 110 S. Ct. 1927 (1990); see also Government of the Virgin Islands v. Williams, 892 F.2d 305, 309-312 (3d Cir. 1989) (failure to object constitutes consent to reference), cert. denied, 110 S. Ct. 2211 (1990).[7]

Any error below was a procedural lapse, not a jurisdictional failing. Archie v. Christian, 808 F.2d 1132, 1134-35 (5th Cir. 1987). "We do not have a 'jurisdictional' problem . . . . We have at most a mistaken interpretation of a law designating which

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[5] While the Ninth Circuit decided the case on different grounds, one of the issues before the Supreme Court, to be heard Tuesday, October 2, is whether a magistrate's lack of statutory authority is a non-waivable defect. See Brief of the United States at 19-21, United States v. France, No. 89-1363 (U.S. certiorari granted Apr. 24, 1990). In my view, we should "decline appellant's invitation to rule in a vacuum," United States v. De La Cruz, 902 F.2d 121, 125 (1st Cir. 1990), and await the Court's decision before deciding the instant case. Deciding the matter immediately serves little purpose, but risks wasting judicial resources.

[6] Similarly, Government of the Virgin Islands v. Williams, 892 F.2d 305 (3d Cir. 1989), calls In re Morrissey, 717 F.2d 100 (3d Cir. 1983), into doubt.

[7] A panel of the First Circuit also reached this conclusion in United States v. Lopez-Pena, 890 F.2d 490, 495 n.6 (1st Cir. 1989) (advance edition), but the opinion was withdrawn so the case could be reheard en banc and the en banc opinion does not address the issue. See United States v. Martinez-Torres, ___ F.2d at ___ n.8 (Selya, J., dissenting).

judicial officer shall preside over which proceedings." United States v. Wey, 895 F.2d at 431.

Gomez does not control, for the appellant there did object to the magistrate's involvement. United States v. Sawyers, 902 F.2d 1217, 1220 (6th Cir. 1990); United States v. Mang Sun Wong, 884 F.2d 1537, 1545 (2d Cir. 1989), cert. denied, 110 S. Ct. 1140 (1990). Gomez's mention of "jurisdiction" does not mean that the Act is a jurisdictional statute. "[T]he word is a many-hued term . . . . Gomez uses the word 'jurisdiction' in a context revealing that the Court meant 'authority.'" United States v. Wey, 895 F.2d at 431; accord United States v. Musacchia, 900 F.2d 493, 503 (2d Cir. 1990) (court is "[u]nable to square the Supreme Court's use of the word 'jurisdiction' with traditional notions of subject matter jurisdiction"); Black's Law Dictionary 443 (abr. 5th ed. 1983) ("The word is a term of large and comprehensive import, and embraces every kind of judicial action.").

III.

On August 18, 1987, the magistrate held an evidentiary hearing, which was recorded. On September 16, he recommended that Clark's suit be dismissed. Clark objected to this recommendation, but on December 31 the district court dismissed the action. The dismissal order states that the court "made a de novo review" of the case, R. Vol. I, Tab 49, at 2, but the recording of the evidentiary hearing had not yet been transcribed.

"When objections are made to the magistrate's factual findings based on conflicting testimony or evidence, both § 636(b)(1)

and Article III of the United States Constitution require de novo review." Gee v. Estes, 829 F.2d 1005, 1008 (10th Cir. 1987). "In conducting this review, the district court must, at a minimum, listen to a tape recording or read a transcript of the evidentiary hearing." Id. at 1009.

Gee was decided three months before the district court dismissed Clark's action. We presume that the district court knew the relevant law, United States v. Lowden, 905 F.2d 1448, 1449 n.1 (10th Cir. 1990), so the court's statement that it conducted a de novo review must be taken to mean that it listened to the tape recording of the hearing before it dismissed Clark's suit. Indeed, because of the expense and delay[8] of transcription, district courts commonly listen to a tape rather than await a transcript.

Branch v. Martin, 886 F.2d 1043 (8th Cir. 1989), which remanded in similar circumstances, is distinguishable. As here, the district court adopted the magistrate's recommendations before the transcript of a recorded hearing was prepared. As here, the district court stated that it had conducted a de novo review, but did not say anything about listening to the tape. Id. at 1046; see also Moran v. Morris, 665 F.2d 900, 901-02 (9th Cir. 1981) (court of appeals remanded for further review of tape-recorded proceedings before magistrate after district court adopted magistrate's recommendations the day they were issued). The important distinction is that Branch announced for the Eighth

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[8] The transcript in this case was not prepared until almost 14 months after the hearing was held. See R. Supp. Vol. II.

Circuit the rule ..e adopted in Gee. The dis .ct court in Branch did not have the benefit of that decision, but the court below was aware of Gee. The doubts the Eighth Circuit held about the breadth of that district court's review would be unfounded here.

IV.

On the merits of Clark's claims, I agree with the decision of the district court. Accordingly, I would affirm the judgment.

F.2d 605, 610 (1st Cir.1990); *United States v. Nasworthy*, 710 F.Supp. 1353, 1355 (S.D. Fla.1989); *see generally Montana v. United States*, 440 U.S. 147, 153–55, 99 S.Ct. 970, 973–74, 59 L.Ed.2d 210 (applying "laboring oar" analysis in civil context).

[9] We need not refine the somewhat ambiguous contours of this test, since appellees' contentions fall far short of showing the kind of close relationship that would meet even the lower hurdle of active participation.

At a minimum, it must be shown that federal prosecutors actively aided the state prosecutors during the local suppression hearing. Only then can it be said that their interests in enforcing federal law were sufficiently represented. The record here is totally barren of evidence of such control or participation. No federal prosecutors were present in Judge Fromer's courtroom during the suppression hearing. Nothing indicates that they provided assistance or advice to the local authorities at any time, or were involved in any way with the local prosecution or the decision not to appeal the suppression order.

Accordingly, in the circumstances of this case, we cannot say that the federal government was in privity with the state prosecution. Appellees have not met their minimum burden, to establish that the United States played a role as a "laboring oar" in the conduct of the state proceedings.

We note that even if the necessary identity of parties existed through privity, collateral estoppel would be inappropriate unless the issue resolved in the first proceeding was the same as the issue sought to be relitigated. *See Dowling v. United States*, — U.S. —, 110 S.Ct. 668, 673, 107 L.Ed.2d 708 (1990); *Montana*, 440 U.S. at 153, 99 S.Ct. at 973. It is unclear whether the state suppression order was premised on the Fourth Amendment or on state law. In federal court, however, evidence should be suppressed only where federal law has been violated and the federal exclusionary rule applies. The Supreme Court has stressed that

> a federal court must make an independent inquiry, whether or not there has been such an inquiry by a state court, and irrespective of how any such inquiry may have turned out. The test is one of federal law, neither enlarged by what one state court may have countenanced, nor diminished by what another may have colorably suppressed.

Elkins v. United States, 364 U.S. 206, 224, 80 S.Ct. 1437, 1447, 4 L.Ed.2d 1669 (1960). For this reason as well, it would be improper to deny the government an opportunity to present its arguments at a federal suppression hearing.

We have considered all of appellees' additional arguments and have found them to be without merit.

CONCLUSION

In sum, we are not holding that a federal prosecution can never be precluded from offering evidence that has been suppressed in a state prosecution. We are holding that to justify such an order of suppression the level of federal participation in the state prosecution must be of substantially greater magnitude than displayed here.

The judgment of the district court is reversed and we remand for disposition consistent with this opinion.

John J. McCARTHY, Plaintiff–Appellant,

v.

George BRONSON, Warden, Lt. Steve T. Ozier, Officer Paul Lusa, and Officer Michiewicz, Individually and in their official capacities as Officers of the Connecticut Department of Correction, Defendants–Appellees.

No. 651, Docket 89–2389.

United States Court of Appeals, Second Circuit.

Submitted March 1, 1990.

Decided June 22, 1990.

Prisoner brought action challenging actions taken by prison officials. The Unit-

ed States District Court for the District of Connecticut, José A. Cabranes, J., entered judgment in favor of defendants, and prisoner appealed. The Court of Appeals, Jon O. Newman, Circuit Judge, held that: (1) proceedings before magistrate were proper, and (2) prisoner waived right to jury trial by agreeing to trial before magistrate, even though he later revoked that consent.

Affirmed.

1. **United States Magistrates** ⇐13

Because magistrate could have declined to have vacated consent to trial by magistrate, he could take the lesser step of agreeing to hear the evidence and submitting recommended findings to the district judge. 28 U.S.C.A. § 636(b)(1)(B), (c).

2. **United States Magistrates** ⇐21

Statute authorizing district judge to refer prisoner's petition challenging the "conditions of confinement" to a magistrate for recommended findings applies in cases challenging a specific episode of allegedly unconstitutional conduct, not merely those challenging continuing prison conditions. 28 U.S.C.A. § 636(b)(1)(B).

See publication Words and Phrases for other judicial constructions and definitions.

3. **United States Magistrates** ⇐29

It would have been improper for court to treat findings of magistrate in action challenging conditions of confinement of prisoner as the report of a special master and to accept the findings as not clearly erroneous. 28 U.S.C.A. § 636(b)(1, 2); Fed. Rules Civ.Proc.Rule 53(e)(2), 28 U.S.C.A.

4. **United States Magistrates** ⇐26

District court which did not confine review of magistrate's findings in action brought by prisoner challenging conditions of confinement to the narrow scope appropriate for findings of a special master but also explicitly determined that, upon a de novo determination, it would reach the same conclusions as the magistrate adequately fulfilled its responsibilities with respect to review of the magistrate's report. 28 U.S.C.A. § 636(b)(1).

5. **Jury** ⇐25(6)

The "last pleading directed to" an issue is not the pleading that raises the issue, but, rather, the pleading that contests the issue, which is normally an answer or a reply to a counterclaim, and it is the filing of that document which starts the ten-day period within which a demand for jury trial must be filed. Fed.Rules Civ.Proc.Rule 38(b, d), 28 U.S.C.A.

6. **Jury** ⇐25(6)

Where answer to second amended complaint was not filed until after plaintiff had demanded jury, there was no waiver of right to jury by reason of late demand where no answer was filed to the original complaint or the first amended complaint. Fed.Rules Civ.Proc.Rule 38(b, d), 28 U.S.C.A.

7. **Jury** ⇐28(1)

Fact that plaintiff did not object to proceeding without a jury at the start of the hearing before the magistrate did not waive right to jury trial where the jury claim had previously been challenged by the defendant and adjudicated by the district court.

8. **Jury** ⇐28(6)

Prisoner waived entitlement to jury in action challenging action taken by prison officials when he consented to trial before magistrate, even though he later revoked that consent. 28 U.S.C.A. § 636(c); Fed. Rules Civ.Proc.Rule 39(a), 28 U.S.C.A.

9. **Jury** ⇐28(1)

Waiver of right to jury which occurred when plaintiff agreed to trial before magistrate was not rendered invalid because it occurred prior to the filing of the defendant's answer. 28 U.S.C.A. § 636(c); Fed. Rules Civ.Proc.Rule 39(a), 28 U.S.C.A.

10. **Jury** ⇐28(1)

There is no starting time for waiver of right to jury trial and waiver may be agreed to even before lawsuit arises. Fed. Rules Civ.Proc.Rule 39(a), 28 U.S.C.A.

11. **Federal Courts** ⇐694

Prisoner was not entitled to free transcript of hearing before magistrate where the issues on appeal did not require examination of the evidence presented at the hearing before the magistrate. 28 U.S.C.A. § 753(f).

John J. McCarthy, Leavenworth, Kan., pro se.

Clarine Nardi Riddle, Atty. Gen., Steven R. Strom, Asst. Atty. Gen., Hartford, Conn., for defendants-appellees.

Before OAKES, Chief Judge, NEWMAN and WALKER, Circuit Judges.

JON O. NEWMAN, Circuit Judge:

John J. McCarthy, a state prisoner, appeals *pro se* from the June 19, 1989, judgment of the District Court for the District of Connecticut (José A. Cabranes, Judge) in favor of the defendant state prison officials. McCarthy sued under 42 U.S.C. § 1983 (1982), alleging unlawful removal from his cell and use of excessive force. The judgment was entered after a hearing conducted by Magistrate F. Owen Eagan. The case is complicated by some uncertainty as to the authority of the Magistrate in recommending proposed findings to the District Judge and the authority of the District Judge in approving those recommended findings. The appeal challenges procedural irregularities concerning the reference to the Magistrate, the lack of a jury trial, the denial of a free copy of a hearing transcript, and the merits of the fact-finding. We affirm.

Before setting forth the procedural facts, it will be helpful to outline pertinent provisions of the Federal Magistrates Act, 28 U.S.C. §§ 631-39 (1982 & Supp. V 1987). Four types of reference from a district judge to a magistrate are implicated in this case. First, subsection 636(b)(1) permits a judge to designate a magistrate to handle pretrial matters, with the Magistrate authorized by subsection 636(b)(1)(A) to rule on most pretrial motions and authorized by subsection 636(b)(1)(B) to recommend rulings on motions excepted from subsection 636(b)(1)(A). Second, subsection 636(b)(1)(B) also permits a judge to designate a magistrate "to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court ... of prisoner petitions challenging conditions of confinement." Third, subsection 636(b)(2) permits a judge to designate a magistrate "to serve as a special master pursuant to the applicable provisions of [Title 28] and the Federal Rules of Civil Procedure." This subsection also permits a judge to designate a magistrate to serve as a special master in any civil case, upon consent of the parties, without regard to Fed.R.Civ.P. 53(b), which limits use of a master to exceptional cases. Fourth, subsection 636(c) permits a magistrate, upon consent of the parties, to try any civil case and render a judgment.

Background

Plaintiff's original complaint, filed in April, 1983, alleged that various officials at the Connecticut Correctional Institution at Somers had ordered or carried out his forcible removal from his prison cell by means of tear gas and excessive force, in violation of the Eighth and Fourteenth Amendments. The complaint named only Warden Robinson as a defendant and made no demand for a jury trial. Shortly after the complaint was filed, Judge Cabranes referred the case to Magistrate Eagan for pretrial proceedings under 28 U.S.C. § 636(b)(1)(A), a reference that was soon broadened. On February 28, 1985, in open court the plaintiff and defendant's counsel executed a standard consent form, agreeing to have the case tried by a magistrate, pursuant to 28 U.S.C. § 636(c), and electing to take any appeal from the magistrate's judgment to the district judge, pursuant to § 636(c)(4). At that time, the Magistrate explained to McCarthy that the trial would be held by the Magistrate at Somers Prison without a jury. McCarthy did not object. Conducting non-jury trials at the prison frequently benefits a prisoner-claimant, since witnesses and documents, needed unexpectedly, are more accessible. On March 5, 1985, Judge Cabranes entered an order

referring the case to Magistrate Eagan "for all further proceedings and the entry of judgment in accordance with Title 28, § 636(c)."

On April 12, 1985, McCarthy filed an amended complaint. This complaint added several defendants but did not alter the substantive allegations. It made no jury demand. On July 2, 1985, he filed a second amended complaint, again adding parties but not altering his substantive allegations. This complaint contained a jury demand. Defendants filed their answer to the second amended complaint on August 26, 1985. No answer had been filed to the prior complaints.

On October 23, 1986, defendants filed papers opposing plaintiff's jury demand, contending, among other things, that McCarthy had agreed to a non-jury trial before the Magistrate on February 28, 1985. On December 22, 1986, Judge Cabranes ruled that plaintiff was not entitled to a jury trial; he relied on the absence of a timely jury demand, *see* Fed.R.Civ.P. 38(b), (d), and noted that the right to a jury trial, once waived, is not revived by an amended complaint that raises no new issues, *see Lanza v. Drexel & Co.*, 479 F.2d 1277, 1310–11 (2d Cir.1973) (in banc). On October 22, 1987, McCarthy moved for a jury trial; the Magistrate recommended denial based on the District Judge's 1986 ruling, and Judge Cabranes adopted this recommendation on January 29, 1988.

On March 24, 1988, plaintiff appeared before the Magistrate for a bench trial at Somers Prison. At the start of the trial, the Magistrate sought a second written consent to proceed under subsection 636(c), even though a first consent had been executed on February 28, 1985. McCarthy refused. Apparently, the Magistrate construed McCarthy's refusal to sign the second consent form as a motion to withdraw the original consent and granted the motion. Magistrate Eagan then conducted an eight-day trial at the conclusion of which he issued a decision entitled "Recommended Findings of Fact and Memorandum of Decision." He recommended detailed findings of fact and ultimate conclusions that excessive force had not been used and that no unlawful action had occurred. When the matter reached the District Court, Judge Cabranes accepted the recommended findings and ordered judgment for the defendants. His endorsement of the Magistrate's proposed findings reflected the Judge's understanding that the matter had been referred under subsection 636(b)(1), *i.e.*, referred for recommended findings. However, in ruling on post-judgment motions, Judge Cabranes amended the citation to subsection 636(b)(1) and stated that after allowing the plaintiff to withdraw his consent, Magistrate Eagan had "essentially act[ed] as a special master pursuant to his powers under 28 U.S.C. § 636(b)(2) and Rule 1(C)(5) of the Local Rules." Judge Cabranes then adopted the Magistrate's recommended findings, acting under Fed.R.Civ.P. 53(e)(2), which requires a district judge to accept a special master's findings of fact unless clearly erroneous. Finally, the District Judge added, "Even upon a *de novo* determination I would reach the same conclusions as the Magistrate." All motions for post-judgment relief were denied.

Discussion

The tangled sequence of events has created some problems, but none that impairs the validity of the judgment rejecting plaintiff's claims on their merits.

1. *The Authority of the Magistrate.* The parties' February 28, 1985, consent to have the matter tried by the Magistrate pursuant to subsection 636(c) was entirely valid. Once given, that consent may be withdrawn on the Court's own motion "for good cause shown" or on request of a party who shows "extraordinary circumstances" warranting such relief. 28 U.S.C. § 636(c)(6); *see Fellman v. Fireman's Fund Insurance Co.*, 735 F.2d 55, 57–58 (2d Cir.1984). No such circumstances existed in this case. The Magistrate therefore could have proceeded under the original 636(c) reference, made findings, and entered judgment. However, he elected not to do so, preferring instead to permit McCarthy to withdraw consent to the 636(c) reference.

[1] Having vacated the 636(c) reference, the Magistrate then used the authority of subsection 636(b)(1)(B) to conduct a hearing and recommend proposed findings of fact concerning "prisoner petitions challenging conditions of confinement." Whether he acted permissibly is our initial inquiry. The matter had originally been referred to the Magistrate for pretrial purposes, under the authority of subsections 636(b)(1)(A) and (B). Arguably, vacating the 636(c) reference left the Magistrate with only the pretrial assignment he had originally been given, but we do not think he was required to take such a narrow view of his authority. With complete propriety, he could have declined to vacate the 636(c) consent and adjudicated the merits definitively. He was surely entitled to take the lesser step of hearing the evidence and submitting recommended findings to the District Judge. The parties' consent is not required for using that procedure, and it is obvious, from the District Judge's subsequent approval of the Magistrate's findings, that the Judge welcomed the Magistrate's help. It would be a needless ritual now to require the District Judge formally to refer the matter under the "prisoner petition" clause of subsection 636(b)(1)(B). The Judge's adoption of the recommended findings demonstrates that the Magistrate was acting entirely in conformity with authority the Judge wished him to exercise.

[2] A more substantial question is whether McCarthy's lawsuit is a petition "challenging the conditions of confinement" within the meaning of subsection 636(b)(1)(B). Subsection 636(b)(1)(B) was added in 1976 as part of a broadening of the authority of magistrates. Act of Oct. 21, 1976, Pub.L. 94-577, 90 Stat. 2729. The House Report does not explain the category "prisoner petitions challenging conditions of confinement" but does refer to "petitions under section 1983 of Title 42." H.R.Rep. No. 1609, 94th Cong., 2d Sess. 11, *reprinted in* 1976 U.S.Code Cong. & Admin.News 6162, 6171. Most courts have construed the phrase broadly to include almost any complaint made by a prisoner against prison officials, *see Branch v. Martin*, 886 F.2d 1043, 1045 n. 1 (8th Cir.1989) (collecting cases). However, there is a minority view that has focused on the phrase "conditions of confinement" and concluded that it covers only challenges to pervasive prison conditions and excludes claims concerning specific episodes of misconduct by prison officials. *See e.g., Houghton v. Osborne*, 834 F.2d 745 (9th Cir.1987); *Hill v. Jenkins*, 603 F.2d 1256, 1259 (7th Cir.1979) (Swygert, J., concurring).

We see no reason why a Magistrate with clear authority to hold hearings and recommend findings as to the unconstitutionality of continuing prison conditions may not perform a similar function as to specific episodes of unconstitutional conduct by prison officials. The phrase "conditions of confinement" appears not to have been selected as a limitation to preclude episodes of misconduct, but rather as a generalized category covering all grievances occurring during prison confinement. This meaning emerges from comparing the phrase with the immediately preceding category in subsection 636(b)(1)(B) that covers "applications for posttrial relief made by individuals convicted of criminal offenses." Congress evidently wished magistrates to assist district judges with respect to all prisoner claims and selected phrases to describe the two broad categories of prisoner claims cognizable under 28 U.S.C. §§ 2254, 2255 (challenges to convictions) and 42 U.S.C. § 1983 (challenges to conditions of confinement). *See generally Preiser v. Rodriguez*, 411 U.S. 475, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973).

The Magistrate was therefore entitled to hold a hearing on McCarthy's complaint and submit recommended findings to the District Judge.

[3] 2. *The Authority of the District Judge.* After initially viewing the Magistrate's proposed findings as submitted under subsection 636(b)(1) and adopting them, Judge Cabranes altered his view in his post-judgment ruling and considered the Magistrate's findings to be "essentially" those of a special master acting under subsection 636(b)(2). Then, explicitly referring to Rule 53(e)(2) of the Federal Rules of

Civil Procedure, governing judicial consideration of a master's findings in a nonjury case, the District Judge accepted the findings as not clearly erroneous, the standard under Rule 53(e)(2). Had the Judge stopped there, his ruling would have been infirm for two reasons.

First, the Magistrate made and forwarded his findings under subsection 636(b)(1), and that subsection requires *de novo* review of any proposed findings to which objection was made. Though we are confident that the Magistrate would exercise the same high degree of care and conscientiousness whether his findings were to be reviewed *de novo* or under a clearly erroneous standard, we would have considerable doubt whether proposed findings made in the expectation of plenary review would be valid, absent reassessment by the recommender, if in fact they received review only under a less rigorous standard. Second, we would also doubt whether this fairly straightforward section 1983 suit would qualify for reference to a special master under the exacting standards of Rule 53(b) (in nonjury matters "a reference shall be made only upon a showing that some exceptional condition requires it" except where a claim requires an accounting or a difficult computation of damages).

[4] Fortunately, the District Judge did not confine his review to the narrow scope appropriate for findings of a special master. Judge Cabranes explicitly determined that upon a *de novo* determination he "would reach the same conclusions as the Magistrate regarding the matters to which there has been objection." This confirmation of the discharge of his responsibilities, as he had originally exercised them under subsection 636(b)(1) when he first adopted the proposed findings, eliminates all question as to the validity of the findings.

[5,6] 3. *Waiver of Jury Trial.* McCarthy contends that he was entitled to a jury trial and never waived this right. The District Judge denied McCarthy a jury on the ground that he had not made a timely demand, pointing out that the initial complaint did not claim a jury and that the second amended complaint, making the demand, added no new substantive allegations. The Civil Rules require a demand for jury trial on an issue no later than ten days "after the service of the last pleading directed to such issue." Fed.R.Civ.P. 38(b). Failure to make a timely demand constitutes a waiver. *Id.* 38(d). However, "the last pleading directed to" an issue is not the pleading that raises the issue, it is the pleading that contests the issue. Normally, that pleading is an answer, or, with respect to a counterclaim, a reply, *id.* Rule 12(a); *see 5 Moore's Federal Practice* ¶ 38.39[2], at 38-367 (2d ed. 1988). In this case, no answer was filed to either the original complaint or the first amended complaint. The answer to the second amended complaint was not filed until August 26, 1985, after plaintiff had made a jury demand. There was thus no waiver by reason of a late demand.

[7] Nor, as the defendants contend, relying on *Lovelace v. Dall*, 820 F.2d 223, 227-29 (7th Cir.1987), was there a waiver because McCarthy did not object to proceeding without a jury at the start of the hearing before the Magistrate. *See also Royal American Managers, Inc. v. IRC Holding Corp.*, 885 F.2d 1011, 1018-19 (2d Cir.1989). *Lovelace* deemed the plaintiff to have acceded to a bench trial by not objecting at its start, but the case differs significantly from ours because the issue of entitlement to a jury was never litigated. By contrast, McCarthy's jury claim was challenged by the defendants and adjudicated by the District Court. Once that adverse ruling was made, McCarthy was not required to renew his jury demand at the start of the Magistrate's hearing in 1988.

[8] Nevertheless, the defendants are correct in urging that McCarthy waived entitlement to a jury in the proceedings before the Magistrate in 1985 when he consented to proceeding under subsection 636(c). At that time, the Magistrate explained to McCarthy in open court that the proceedings would be conducted at the prison as a bench trial without a jury. With that understanding, McCarthy agreed to the subsection 636(c) procedure. This agreement was consent to a non-jury trial under Rule 39(a). The fact that the Magistrate, three years later, permitted McCarthy to renege on his agreement to have the issues tried by the Magistrate under subsection 636(c) and instead made recommended findings subject to *de novo* review by the District Judge under subsection 636(b)(1) does not undermine the waiver of a jury. McCarthy, though not entitled to any change, succeeded in changing the identity of the judicial officer with final fact-finding responsibility; he did not thereby rescind his consent to have the facts found by a judicial officer.

[9,10] Nor is the waiver invalid because it occurred prior to the defendants' answer. There is no starting time for jury waivers. They may be agreed to even before a lawsuit arises. *See Rodenbur v. Kaufmann*, 320 F.2d 679, 683-84 (D.C.Cir. 1963). Though a litigant might have a basis for obtaining relief from a jury waiver where a subsequent pleading alters the nature of the issue to be decided from what it appeared to be at the time of the waiver, the defendants' answer here had no such effect.

[11] 4. *Free Transcript.* Judge Cabranes denied plaintiff's request for a free transcript of the hearing before the Magistrate, relying on 28 U.S.C. § 753(f) (free transcripts not required where issues frivolous). Though the procedural issues in this case are not frivolous, their resolution does not require examination of the evidence presented at the hearing before the Magistrate, and it was not error to deny McCarthy a free copy of the transcript of that hearing.

5. *Fact-finding.* McCarthy's challenge to the factfinding is without substance. He contends that prison officers planted a knife in his cell as a pretext to remove him. The Magistrate and the District Judge were entitled to reject this claim.

We have considered McCarthy's remaining contentions and find them without merit. The judgment of the District Court is affirmed.

UNITED STATES of America, Appellant,

v.

William RILEY, Defendant-Appellee,

Norman Burnett, Jeffrey Sizemore, Vincent Mazza, Defendants.

No. 575, Docket 89-1387.

United States Court of Appeals, Second Circuit.

Argued Jan. 8, 1990.

Decided June 22, 1990.

The United States appealed from an order of the United States District Court for the District of Vermont, Franklin S. Billings, Jr., Chief Judge, suppressing items seized pursuant to two search warrants. The Court of Appeals, Jon O. Newman, Circuit Judge, held that: (1) search warrant authorizing officers to seize bank records, business records and safety deposit box records at defendant's residence was sufficiently particularized, even though it allowed officers some discretion in executing warrant; (2) officers had probable cause to obtain warrant to search storage locker; and (3) officers acted in good faith in seizing weapons during execution of premises search warrant which explicitly authorized seizure of firearms.

Reversed.

Weinstein, District Judge, sitting by designation, filed a dissenting opinion.

1. Searches and Seizures ⇐125

A search warrant authorizing officers to seize bank records, business records and safety deposit box records from narcotics defendant's residence was sufficiently particularized, even though the warrant permitted officers to examine many papers in the defendant's possession and did not

ORIGINAL

No. 90-5635

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1990

JOHN J. MCCARTHY,

Petitioner

v.

GEORGE BRONSON, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Respondents urge the Court to deny review on two grounds. First, they contend that, in light of the broad allegations in petitioner's complaint, the question whether a single episode of unconstitutional conduct qualifies as a "condition[] of confinement" within the meaning of 28 U.S.C. § 636(b)(1)(B) is not squarely presented. Second, they suggest that the intercircuit conflict on this issue is "illusory." Br. in Opp. 2. Neither argument has merit. Because this case directly presents a question of recurring importance to the disposition of prisoner litigation in the federal judicial system, and because the courts of appeals are sharply divided on that issue, the Court should grant the petition for certiorari.

1. Respondents' principal contention is that McCarthy's second amended complaint alleged "far more than one specific episode of alleged unconstitutional conduct," and that, accordingly, the case was properly referred to the magistrate even under petitioner's reading of section 636(b)(1)(B). Br. in Opp. 2 & 8. In support of this argument, respondents suggest that the complaint should be interpreted as mounting a broad challenge to, e.g., the prison's "practices and regulations with regard to [McCarthy's] placement in segregation," the sufficiency of the prison's written policies regarding the use of force (including chemical weapons) on inmates, and the adequacy of the medical treatment petitioner received after the incident. Id. at 2-6.

Respondents' interpretation, which elevates certain factual assertions in petitioner's pro se complaint to the status of independent claims, is simply incorrect. As even a cursory review of the complaint reveals, virtually all of the "claims" respondents purport to find are merely factual allegations included either (1) as part of petitioner's comprehensive account of the events underlying his claim, or (2) because they pertain directly to his central contention that he was subjected to unconstitutionally excessive force on a single occasion. See Magistrate's Recommended Findings of Fact and Memorandum of Decision, Br. in Opp. App. 5, at A25-26 (setting forth Second

Circuit's four-prong test for determining whether force was excessive). For example, rather than challenging prison policies "with regard to his placement in segregation," Br. in Opp. 2, the complaint merely alleges that McCarthy was placed in administrative segregation as a result of the disciplinary infractions that occurred on the date of the incident. Second Amended Complaint ¶¶ 53, 55, Br. in Opp. App. 9, at A53.[1] Similarly, petitioner's allegations regarding the medical attention he received after the July 13, 1982 incident -- far from being a broad challenge to prison medical conditions -- are included only because of their relevance to damages from the alleged assault.

Moreover, to the extent that the legal claims contained in McCarthy's complaint can be read as broader than an allegation of a single incident of excessive force, a pretrial ruling specified that the only issue to be joined at trial was whether "defendants violated his constitutional rights when they sprayed him with 'Big Red,' a chemical weapon similar to mace." Br. in Opp. App. 7, at A34; see also id. at A37 (petitioner's complaint "set[s] forth the constitutionality of the use of mace as the issue to be resolved"). Thus, even if the complaint somehow

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1 The reference to being placed in segregation may also bear on his claim that that he was inappropriately denied good time credits. See Br. in Opp. App. 9, at A53. That claim: (1) was effectively eliminated from the case in a pre-trial ruling by the district judge, see Br. in Opp. App. 7, at A34-37; (2) was not even alluded to in the magistrate's opinion; and (3) in any event, does not constitute a challenge to "conditions of confinement."

could be construed to contain more broad-based claims, they were neither pursued by petitioner nor adjudicated by the magistrate.[2]

In light of these events, it comes as no surprise that the interpretation of petitioner's complaint urged by respondents has been rejected by all of the judicial officers who have reviewed this case. Both the magistrate and the district judge, as well as a unanimous panel of the court of appeals, understood petitioner's complaint and lawsuit to involve a single, specific incident of unconstitutional conduct. See Magistrate's Recommended Findings of Fact and Memorandum of Decision, Br. in Opp. App. 5, at A12; Ruling on Pending Motions (Dec. 22, 1986) (per Cabranes, J.), Br. in Opp. App. 8, at A37; McCarthy v. Bronson, 906 F.2d 835, 837-39 (2d Cir. 1990). Because the record fully supports that conclusion, the question whether challenges to such incidents fall within the jurisdictional grant of 28 U.S.C. § 636(b)(1)(b) is squarely presented in this petition.

2. Equally unfounded is respondents' contention that the division in the courts of appeals on this issue is "illusory."

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2 Six of the seven numbered paragraphs in the "legal claims" section of petitioner's complaint, see Second Amended Complaint ¶¶ 61-67, Br. in Opp. App. 9. at A54, concerned the excessive-force claim. The seventh, paragraph 63, alleged a due process violation based on loss of good time credit, which, as noted above, was neither pursued by petitioner nor adjudicated by the magistrate. See supra note 1. In his prayer for relief, petitioner did request an injunction requiring the defendants to develop "[d]irectives restricting the use of Tear Gas and the . . . Tear Gas Duster . . . ." Br. in Opp. App. 9, at A55. That request, however, cannot fairly be read as reflecting an independent challenge to prison policies and procedures. To the contrary, read in the context of the whole complaint, that relief was requested as a means of protecting McCarthy from any future assaults of the nature suffered on July 13, 1982.

Br. in Opp. 2. Indeed, even under their cramped interpretation of the case law, respondents are forced to acknowledge a clear split of authority on the meaning of section 636(b)(1)(B), with the Tenth and Second Circuits taking diametrically opposed positions on whether "conditions of confinement" include challenges to specific episodes of unconstitutional conduct. Id. at 8. Compare Clark v. Poulton, 914 F.2d 1426, 1439-40 (10th Cir. 1990) with McCarthy v. Bronson, supra, 906 F.2d at 839. In point of fact, as the courts of appeals themselves have acknowledged, the division is considerably more widespread than that, with at least five circuits having taken sharply divergent views on the question. See, e.g., Clark v. Poulton, supra, 914 F.2d at 1429 (noting that five other circuits had addressed the issue); id. at 1434 & n.1 (Anderson, J., dissenting) (acknowledging a 2-2 split on the issue); McCarthy v. Bronson, supra, 906 F.2d at 839 (setting out majority and "minority" views); see also Houghton v. Osborne, 834 F.2d 745, 749 (9th Cir. 1987) (in case pre-dating contrary Eighth and Second Circuit decisions, adopting reading of § 636(b)(1)(B) urged by petitioner and noting that the Fourth and Eleventh Circuits had also so held).[3] As these decisions make clear, the question presented in

3 Respondents' efforts to distinguish these cases, or otherwise diminish the extent of the circuit split, are unconvincing. Thus, for example, they contend that Clark is distinguishable because (1) the prisoner there never consented to trial before a magistrate and (2) the applicable local rule did not authorize reference of civil cases to a magistrate. Br. in Opp. 7-9 & n.4. With respect to the former, the distinction is entirely ephemeral, since McCarthy's initial consent was formally vacated and therefore no longer has any legal effect. With respect to the latter, respondent fails to point out that civil trials are referred to a magistrate under § 636(c). See also Clark v. Poulton, supra, 914 F.2d at 1431 n.6. Thus, as Clark itself demonstrates, the absence of a local rule implementing that provision has no relevance to references under § 636(b)(1)(B). Similarly, any restrictions the local rules place upon references of pretrial matters under § 636(b)(1)(A) would have no effect on the reference of prisoner petitions under § 636(b)(1)(B). See id. (citing District of Utah Local Rules 9(d) & (i)).

Equally unconvincing is respondents' suggestion that Hill v. Jenkins, 603 F.2d 1256 (7th Cir. 1979), has been undercut by later developments. See Br. in Opp. 5 n.2. The opinion for the court in Hill cited the Seventh Circuit's Raddatz decision only to distinguish it, and Judge Swygert's separate concurrence advancing his influential reading of section 636(b)(1)(B) did not even cite Raddatz. See 603 F.2d at 1259-60.

this petition continues to divide the courts of appeals. For that reason, and because the issue has great practical importance to the appropriate resolution of a large number of prisoner lawsuits in the federal courts, the Court should grant the petition for certiorari.[4]

4 While this is not the appropriate occasion for addressing the underlying merits, respondents' assertion that the Fourth, Ninth, Tenth, and Eleventh Circuits' reading of section 636(b)(1)(B) "leads to absurd results" is well wide of the mark. Br. in Opp. 9 n.6. This contention suffers from at least three critical flaws: (1) it erroneously focuses on the respective competence of magistrates to hear claims based on specific episodes as opposed to claims challenging widespread conditions, ignoring the unavoidable inference to be drawn from 28 U.S.C. § 636(c) that Congress believed magistrates were capable of hearing both types of claims -- but only when the parties consented; (2) it falsely assumes that cases challenging widespread conditions are always or at least usually more important than cases involving specific episodes of unconstitutional conduct, whereas in fact many conditions cases involve frivolous claims; and (3) it simply overlooks other reasons why Congress might have drawn the line where it did in section 636(b)(1)(B). Other plausible explanations for Congress' excluding claims like petitioner's from section 636(b)(1)(B) include: (a) Congress failed even to consider the distinction urged by petitioner, in which case the clear language of the statute should govern and require reversal in this case; (b) Congress believed that the modern generation of conditions cases involved, as a group, claims that were generally less meritorious than those advanced in cases involving specific episodes of unconstitutional conduct; (c) Congress was worried about the feasibility and mechanics of obtaining consent under section 636(c) in class actions challenging widespread prison conditions, and therefore provided a mechanism for non-consensual

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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*Counsel of Record

Counsel for Petitioner

---

reference of such cases under section 636(b)(1)(B); and (d) Congress believed that lawsuits challenging widespread prison conditions were creating an inordinate drain on judicial resources, and that this was an area where magistrates -- by holding evidentiary hearings, touring prison facilities, and taking the extensive testimony sometimes involved in these cases -- could significantly lighten the workload of federal judges. Any one of these reasons would adequately explain why Congress, in enacting section 636(b)(1)(B), meant what it said.

CERTIFICATE OF SERVICE

As a member of the bar of this Court, I hereby certify that one copy of Petitioner's Reply Brief in support of his petition in McCarthy v. Bronson, No. 90-5635, was served by first-class mail this 26th day of November, 1990, on the following:

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Christopher D. Cerf
Counsel for Petitioner

No. 90-5635

In The

Supreme Court of the United States

October Term, 1990

JOHN J. MCCARTHY,

Petitioner,

v.

GEORGE BRONSON, WARDEN, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

JOINT APPENDIX

JOEL I. KLEIN*
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PETITION FOR CERTIORARI FILED AUGUST 21, 1990
CERTIORARI GRANTED DECEMBER 10, 1990

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July 2, 1985	–Second Amended Complaint filed
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UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JOHN J. McCARTHY	:	
	:	CIVIL ACTION
v.	:	NO. H83 278
CARL ROBINSON, Warden	:	

REFERRAL TO MAGISTRATE

The above-entitled case is referred to Magistrate F. Owen Eagan for the following purpose: further pretrial proceedings. It is so ordered.

Date: March 25, 1983

_____
UNITED STATES
DISTRICT JUDGE

Hartford, Connecticut

FORM 1

FORM TO BE USED BY A PRISONER IN FILING A COMPLAINT UNDER THE CIVIL RIGHTS ACT, 42 U.S.C. SEC. 1983

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

CIVIL CASE NO. H 83 278
[Stamp omitted]

John J. McCarthy

(Enter above the full name and address of the plaintiff in this motion)

v.

Warden Carl Robinson

(Enter above the full name and address of the defendant or defendants in this action)

1. Previous Lawsuits

   A. Have you begun other lawsuits in state or federal court dealing with the same facts involved in this action or otherwise relating to your imprisonment?

      Yes ( ) No (x)

   B. If your answer to A is yes, describe the lawsuit in the space below. (If there is more than one lawsuit, describe the additional lawsuits on another piece of paper, using the same outline.)

   1. Parties to this previous lawsuit

      Plaintiffs _____

Defendants _____

2. Court (if federal court, name the district; if state court, name the county)

3. Docket Number _____

4. Name the judge to whom case was assigned.

5. Deposition (for example: Was the case dismissed? Was it appealed? Is it still pending?)

6. Approximate date of filing lawsuit _____

7. Approximate date of disposition _____

II. Place of present confinement Somers Prison

A. Is there a prisoner grievance procedure in this institution?

yes ( ) No (x)

B. Did you present the facts relating to your complaint in the state prisoner grievance procedure?

Yes (x) No ( )

C. If your answer is YES,

1. What steps did you take?

Ombudsmen

2. What was the result?

None

D. If your answer is NO, explain why not.

E. If there is no prison grievance procedure in the institution did you complain to prison authorities?

Yes ( ) No ( )

F. If your answer is YES,

1. What steps did you take?

2. What was the result?

III. Statement of Claim

(State here as briefly as possible the facts of your case. Describe how each defendant is involved. Include also the names of other persons involved, dates, and places. Do not give any legal arguments or cite any cases or statutes. If you intend to allege a number of related claims, number and set forth each claim in a separate paragraph. Attach extra sheet if necessary and include one copy of this extra sheet for each copy of the complaint submitted).

On 7, 13, 82, I was tear Gassed in cell F-73 for no reason.

IV. Relief

(*State briefly exactly what you want the court to do for you.* Make no legal arguments. Cite no cases or statutes.)

Grant me $100,000 in damages. Correct useage of such wepons [sic] – Get me out of Prison

SIGNED THIS 14 DAY OF March, 1983.

s/ John McCarthy
SIGNATURE OF PLAINTIFF

I declare under penalty of perjury that the foregoing is true and correct.

3, 14, 83

s/ John McCarthy
SIGNATURE OF PLAINTIFF

If you wish to proceed IN FORMA PAUPERIS, complete Form No. 2.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

(Caption Omitted In Printing)

CONSENT TO PROCEED BEFORE A UNITED STATES MAGISTRATE

In accordance with the provisions of Title 28, U.S.C. § 636(c), the parties to the above-captioned civil matter hereby voluntarily waive their rights to proceed before a judge of the United States District Court and consent to have a United States Magistrate conduct any and all further proceedings in the case, including trial, and order the entry of a final judgment.

/s/ John McCarthy
John J. McCarthy, Pro Se — 2/28/85 Date

/s/ Patricia M. Strong
Patricia M. Strong,
Defendant's Counsel — 2/28/85 Date

[Do *not* execute this portion of the Consent Form if the parties desire that the appeal lie directly to the court of appeals.]

In accordance with the provisions of Title 28, U.S.C. § 636(c)(4), the parties elect to take any appeal in this case to a district court judge.

/s/ John McCarthy
John J. McCarthy, Pro Se — 2/28/85 Date

/s/ Patricia M Strong
Patricia M. Strong,
Defendant's Counsel — 2/28/85 Date

_____ Date

ORDER OF REFERENCE

IT IS HEREBY ORDERED that the above-captioned matter be referred to United States Magistrate F. Owen Eagan for all further proceedings and the entry of judgment in accordance with Title 28, U.S.C. § 636(c) and the foregoing consent of the parties.

/s/ José A. Cabranes
José A. Cabranes, U.S.D.J.

3/5/85

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

(Caption Omitted In Printing)

AMENDED COMPLAINT

Plaintiff John J. McCarthy, pursuant to rule 15(a) and 19(a), Fed. R. Civ. Proc., requests leave to file an amended complaint adding four parties and substituting one.

1. Plaintiff in his original complaint named Carl Robinson defendant, since this time of filing Carl Robinson has died and was replaced by Warden George Bronson.

2. Because there were violations of Administrative Directives involved in the petitioners complaint, petitioner would like to add Commissioner Raymond Lopes also as defendant.

3. Since the filing of the complaint the petitioner has determined the names of the other officers involved. Officer Loutenent [sic] Stvev [sic] Tozier, officer Paul Lusa, and officer Mickiewicz, all who are correctional officers and working for then Warden Carl Robinson.

4. On July 13, 1982 the above mentioned officers in (3) Violated administrative Directives and maliciously and sadistically for the very purpose of causing harm aauthorized [sic] and used a chemical weapon and assaulted the plaintiff John J. McCarthy #14163.

5. Plaintiff John J. McCarthy would like to seek $10,000 relief from each named defendant.

April 12, 1985 After oral argument at Somers Prison on April 11, 1985, permission to file this Amended Complaint is granted. Plaintiff is given until May 12, 1985, to file his Second Amended Complaint.

/s/ (Illegible)
United States Magistrate

WHEREFORE, The plaintiff requests this court to order that Raymond Lopes, George Bronson, Loutenent Steve Tozier, Officer Paul Lusa and Officer Mickiewicz be added as party defendants.

The Plaintiff
John J. McCarthy #14163

By /s/ John J. McCarthy
John J. McCarthy #14163
P.O. Box 100
Somers, Conn., 06071

(Certificate Of Service Omitted In Printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

(Caption Omitted In Printing)

SECOND AMENDED (CIVIL RIGHTS) COMPLAINT
WITH A JURY DEMAND

This is a § 1983 action filed by John J. McCarthy, a state prisoner, on April 11, 1983 alleging violation of his constitutional rights and seeking money damages, declaratory judgment, and injunctive relief. The plaintiff requests a trial by jury.

I. Jurisdiction

1. This is a civil rights action under 42 U.S.C. § 1983 to redress the deprivation, under color of state law, of rights secured by the Constitution of the United States. The court has jurisdiction under 28 U.S.C. § 1343. Plaintiff seeks declaratory relief pursuant to 28 U.S.C. §§ 2201 and 2202 as well as injunctive relief. Plaintiff also invokes the pendent jurisdiction of this Court.

II. Parties

a. Plaintiffs

2. Plaintiff John J. McCarthy is and was at all times mentioned herein a prisoner of the state of Connecticut in the custody of the Connecticut Department of Corrections confined at the Connecticut Correctional Institute at Somers, Connecticut (hereinafter called "CCI-Somers" for purposes of this Complaint).

b. Defendants

3. Defendant Carl Robinson was the Warden of CCI-Somers until his death on December 18, 1983. Defendant Carl Robinson was legally responsible for the daily operation of CCI-Somers prior to December 18, 1983 and, specifically, on July 13, 1982 and for the welfare of all the inmates then confined in that prison.

4. Defendant George Bronson is the present Warden of CCI-Somers. He replaced the above-named defendant shortly after that defendant's death (first as "Acting Warden" then as Warden) on December 18, 1983). Defendant Bronson is lagally [sic] responsible for the daily operation of CCI-Somers and for the welfare of all the inmates of that prison. On or about July 13, 1982, Defendant George Bronson served as the Assistant Warden of Operations at CCI-Somers.

5. Defendant John Manson was the Commissioner of the Department of Corrections of the State of Connecticut until his death on September 17, 1983. He was legally responsible for the overall operation of the Department on or about July 13, 1982 and for the operation of each institution under its jurisdiction including CCI-Somers.

6. Defendant Steve Tozier is a Correctional Lieutenant at CCI-Somers and, as regards this complaint, was the Supervisor of Cell Block F on July 13, 1982 and the supervisor of the below-next named defendants.

7. Defendant Mickiewicz, Lusa, Jorge, Texiera, Falk, Flowers and Bond are each Correctional Officers of the Department of Corrections, who, at all times

mentioned in this complaint, were assigned to CCI-Somers.

8. Each defendant is sued individually and in his official capacity. At all times mentioned in this complaint each defendant acted under color of Connecticut law.

III. Facts

9. The original complaint in this case was filed on April 11, 1983.

10. On July 13, 1982 at approximately 1:45 P.M., plaintiff was ordered by defendant Mickiewicz to move from his cell (F-36) located in the area of CCI-Somers known as F-Block to another cell located in F-Block (F-85).

11. Plaintiff requested that he be given an explanation of the reason for said move from a supervising officer.

12. No explanation of the reason for said move was provided to plaintiff.

13. Plaintiff refused to move.

14. Defendant Lieutenant Tozier, acting as supervisor of F-Block, authorized the use of force including the use of a chemical weapon to remove plaintiff from his cell (F-36).

15. Plaintiff was forceably removed from his cell by defendants Lusa, Jorge, Texeira, Falk, Flowers and Bond with the use of a chemical weapon.

16. The chemical weapon used to remove plaintiff from his cell was a Tear Gas Duster commonly referred to by correctional sadists as "Big Red."

17. At the time plaintiff was forceably removed from his cell, Administrative Directives of the Department (of Corrections) did not contain a written standard for the use of force.

18. On July 13, 1982 at approximately 2:30 P.M., defendant Tozier ordered defendant Lusa to "gas" the plaintiff.

19. During the course of the forceable removal of the plaintiff from his cell and the giving of the above-said order, defendant Tozier was not line-or-sight of the incident.

20. At the conclusion of 'gassing' the plaintiff, defendants Lusa, Jorge, Texeira, Falk, Flowers and Bond handcuffed the plaintiff and removed him from his cell to another isolation cell.

21. During the course of the afore-mentioned incident the plaintiff did not resist defendants Lusa, Jorge, Texeira, Falk, Flowers and/or Bond, nor did plaintiff threaten any of those defendants with bodily harm.

22. On information and belief, defendant Mickeiwicz had conspired with other prisoners involved in racial riots in F-Block to move me from F-36 to F-85, where those riots were occurring, in order to involve me in those riots.

23. According to the F-Block Log Book, plaintiff was removed from his cell at 2:30 P.M. by defendants Lusa, Jorge, Texeira, Falk, Flowers, and Bond.

24. The Tear Gas Duster mentioned, supra, is a more powerful weapon than mace.

25. The Incident Report signed by defendant Tozier indicates by check-off that "force", "mace", and "restraints" were used in the afore-mentioned forceable removal of plaintiff from his cell.

26. Defendant Tozier stated to the Correctional Ombuds person that he authorized the use of the Tear Gas Duster because: a) he did not have confidence that mace would be effective; and b) he wanted something faster and stronger.

27. There is no standard reporting form for any chemical weapon other than mace used at CCI-Somers.

28. On July 13, 1982 there was no standard reporting form for any chemical weapon other than mace used at CCI-Somers.

29. On information and belief obtained from Training Officer Fields and Standards Compliance Supervisor Mary Anne Connors of the Department (of Corrections):

a) The tear gas duster is considerably more powerful and faster acting than mace.

b) The duster is particularly effective for situations where there is a physical barrier

between the inmate and the officers which would preclude the use of mace (which requires direct contact to be effective); the duster can also be sprayed at a distance and the gaseous cloud that results can "roll" forward and still have an incapacitative effect.

c) The tear gas duster is a more dangerous weapon than mace because of its greater potential to cause burning; to prevent or reduce burning, the area of exposure must be promptly flushed with water.

d) The duster is not supposed to be fired within four feet of the subject nor is it supposed to be aimed at the eyes or head (in contrast to the instructions for mace which specifically call for aiming the weapon between the chin and upper chest area of the subject at close range).

e) The particular model weapon used in this case had proved to be especially dangerous due to an excessively high concentration of the irritant chemical, for which reason the manufacturer had recommended discontinuing its use.

30. There were no written directives governing the use of chemical weapons other than mace at the time this incident occurred.

31. The Directives for use of mace state in relevant part: "It has an approximate range of 15 to 20 feet . . . Being a weapon, final decisions in the firing of this weapon must be made by the Shift Supervisor on duty at the institution at the time."

32. Written policy and procedure of the Department of Corrections and the Institution did not provide for the use of the tear gas duster.

33. Mace was the chemical weapon of choice for the Department of Corrections in a situation involving a single inmate.

34. There was no evidence that the plaintiff was immune to the effects of mace.

35. Plaintiff was confined in his cell, alone, and there were no visual obstructions or significant physical barriers.

36. Plaintiff was not afforded a shower until at least two and one-half hours after the incident.

37. A rinse was especially important in this incident because the weapon had been fired directly at the plaintiff.

38. Plaintiff did not recieve [sic] medical attention until approximately seven hours after the incident and no Medical Incident Report accompanied the Incident Reports of July 13, 1982. The medical records at the CCI-Somers Hospital indicate that Dr. Johnson saw the plaintiff on July 15, 1982. Dr. Johnson observed chemical burns on plaintiff's arm, under his arm, and in his scalp. Plaintiff was treated at that time with an ointment.

39. Post-incident treatment of the plaintiff was inadequate.

40. The gas duster was not properly deployed.

41. The reports of the incident are deficient in that:

a. A use of Mace Report was filed and "mace" was checked off on the Incident Report, creating an inaccurate and misleading record. It was not evident from the record that tear gas had been used.

b. It is not evident from the Incident Report that defendant Tozier was not at the immediate site of the incident. It is not evident that he did not give the order to fire the weapon. The reports did not state where the supervissor [sic] was at the time the gas was dispersed, who gave the order to discharge the weapon, at what range the weapon was discharged, and where it was aimed. Such information is critical in determining whether a chemical weapon was properly deployed.

c. A Medical Incident Report was not filed with the Incident Report. Such a report is required by Administrative Directive 2.3 on reporting of incidents involving use of force.

42. At the time of the incident, neither the Administrative Directives nor the CCI-Somers Operational Directives contained a use of force doctrine. Neither addressed the use of the tear gas duster or other chemical weapons, except mace.

43. Plaintiff suffered extensive injuries to his body, some of which are permanent, as a result of the use of the tear gas duster.

44. On July 14, 1982 at 8:15 A.M. Correctional Officer issued plaintiff a disciplinary report signed

by defendant Mickiewicz charging plaintiff with "Disobeying a direct order" based on plaintiff's refusal to move from his cell.

45. After plaintiff was forceably removed from cell F-36, another inmate was placed in that cell along with plaintiff's personal effects.

46. Another prisoner was confined in cell F-36 along with plaintiff's personal property from approximately 3:00 P.M. until approximately 9:00 P.M. on July 13, 1982.

47. After another prisoner was removed from plaintiff's cell, Correctional Officers Higgins and Dudek purportedly searched plaintiff's cell and found a 10" long shank (home-fashioned knife).

48. The shank referred to above was found among the plaintiff's personal effects.

49. The shank referred to in paragraphs 47 and 48, supra, was not found in the vicinity of plaintiff's bed in cell F-36.

50. On July 13, 1982 at 10:45 P.M. plaintiff's cell (F-36) was searched and Correctional Officer Higgins reported finding the shank described in paragraph 47, supra, among plaintiff's personal property.

51. On July 13, 1982 at 11:30 P.M. plaintiff was issued a disciplinary report signed by Correctional Officer Higgins charging plaintiff with possession of "Contraband" based on the afore-mentioned finding of shank in cell F-36.

52. On July 16, 1982, a hearing was held concerning the disciplinary report described paragraph 44, supra, at which plaintiff plead not guilty to the charge of disobeying a direct order.

53. At the conclusion of the above-mentioned hearing, plaintiff was found guilty and punishments were imposed upon plaintiff including indefinite confinement to punitive segregation and recommended loss of sixty days good conduct time.

54. On July 16, 1982, a hearing was held concerning the disciplinary report described in paragraphs 47 and 48, supra, at which plaintiff plead not guilty to the charge of possession of contraband "class A".

55. At the conclusion of the above-mentioned hearing, plaintiff was found guilty and punishments were imposed upon plaintiff including idefinite [sic] confinement to punitive segregation and recommended loss of sixty days good conduct time.

56. On August 1, 1982, plaintiff was notified by defendant Manson that sixty days of good conduct time had been forfeited as a result of the disciplinary hearing mentioned in paragraphs 52 through 55, above.

57. (reserved for future amendments)

58. (reserved for future amendments)

59. (reserved for future amendments)

60. (reserved for future amendments)

IV. Legal Claims

a. First Cause of Action

61. The actions of the defendants stated in paragraphs 9 through 60 denied plaintiff due process of law in violation of the Fourteenth Amendment to the United States Constitution.

62. Plaintiff's Fourteenth Amendment right to be free of unjustified and excessive use of force was violated when

a) he was tear gassed and

b) forceably removed from his cell.

63. Plaintiff's Fourteenth Amendment right not to be deprived of his liberty interest was violated when he was deprived of his statutorily created good conduct time.

b. Second Cause of Action

64. The actions of the defendants stated in paragraphs 9 through 43 violated state law.

65. Plaintiff alleges that defendants violated state law of assault and battery and the regulations of the Connecticut Department of Corrections with respect to the lawful use of force when plaintiff was sprayed with tear gas while in his cell.

c. Third Cause of Action

66. The actions of the defendant stated in paragraphs 9 through 45 denied plaintiff of his right to freedom from cruel, unusual and corporeal [sic] punishments in violation of the Eighth Amendment to the United States Constitution and subjected the plaintiff to punishments imposed without due process of law in violation of the Fourteenth Amendment to the United States Constitution.

67. Plaintiff's Eighth and Fourteenth Amendment rights to be free from cruel and unusual punishments imposed without due process of law were violated when

a) he was tear gassed and

b) forceably removed from his cell.

V. Relief

WHEREFORE, plaintiff requests this Honorable Court grant the following relief:

A. Issue a declatory judgment that defendants violated the United States Constitution and state law when they:

1) used the tear gas duster on plaintiff without justification;

2) forceably removed plaintiff from cell F-36 and

3) deprived plaintiff of his statutorily-based liberty (good time) interest.

B. Issue an injunction ordering that defendants or their agents:

1) refrain from using tear gas against plaintiff, except when immediately necessary to prevent injury, death, or the destruction of valuable property;

2) immediately formulate and adopt rigid Directives restricting the use of Tear Gas and the weapon known as the Tear Gas Duster to riot situations involving multiple inmates or to situations where there exist barriers obstructing the use of mace.

3) immediately formulate and adopt rigid Directives requiring the immediate post-incident treatment of inmates sprayed with tear gas including adequate medical treatment and shower facilities.

C. Grant compensatory damages in the following amount:

1) $100,000 against defendants Robinson and Bronson;

2) $100,000 against defendant Manson;

3) $10,000 against defendants Tozier and Lusa and from each of them;

4) $10,000 against defendant Mickiewicz; and

5) $5,000 against defendants Jorge, Texeira, Falk, Flowers and Bond, and from each of them.

D. Grant punitive damages of $100,000 against each of the the [sic] defendants.

E. A jury trial on all issues triable by jury.

F. Plaintiff's cost of this suit including, but not limited to, attorney's fees (if any).

G. Such other and further relief as this court deems just, proper and equitable.

Dated: April 19, 1985 at Somers, Connecticut.

Respectfully submitted,

/s/ John J McCarthy
John J. McCarthy
Post Office Box 100
Somers, Conn. 06071
In Propria Personam

(Verification Of Service Omitted In Printing)

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

(Caption Omitted In Printing)

Civil No. H-83-278 (JAC)

RULING ON PENDING MOTIONS

The plaintiff, an inmate at the Connecticut Correctional Institution Somers ("CCIS"), has brought this action *pro se* and *in forma pauperis* pursuant to 42 U.S.C. Sec. 1983. Included as defendants are the warden at CCIS, as well as several correctional officers. The plaintiff claims that the defendants violated his constitutional rights when they sprayed him with "Big Red," a chemical weapon similar to mace. Presently pending are: (1) Plaintiff's Motion for a Preliminary Injunction; (2) Plaintiff's Motion for Copies of all Pretrial Transcripts; and, (3) Defendants' Objection to the Plaintiff's Jury Demand in the Second Amended Complaint.

I. Plaintiff's Motion for a Preliminary Injunction

On October 7, 1986, the plaintiff filed a motion seeking an order enjoining prison officials from transferring him to another correctional facility. He claims that the defendants arranged this transfer so that his legal material would be lost in transit, thus impeding his access to the court. He further states that officials effectuated this transfer in retaliation for the numerous legal actions the plaintiff has filed against Department of Corrections employees. However, by October 6, 1986, the plaintiff already had been transferred to the United States Penitentiary in Terre Haute, Indiana. *See* Affidavit of Commissioner Lopes, Exhibit A.

Since the plaintiff seeks to block a transfer which has already occurred, his request for injunctive relief is moot. *See Bevah v. Coughlin*, 789 F.2d 986 (2d Cir. 1986). Moreover, an inmate ordinarily has no constitutionally protected interest in remaining in one facility as opposed to another. *Olim v. Wakinekona*, 461 U.S. 238 (1983); *Meachum v. Fano*, 427 U.S. 215 (1976). In this particular case, the plaintiff's allegation that his transfer was effectuated for an improper reason does not change this conclusion. The plaintiff, while confined at CCIS, has received over forty misconduct reports since 1981. He has engaged extensively in conduct with has jeopardized institutional order and security. Prison officials have transferred the plaintiff to another institution in order to maintain order at CCIS, as well as to offer the plaintiff an opportunity to get a fresh start in a different general prison population. *See* Lopes Affidavit. Officials are afforded wide-ranging deference in executing practices designed to preserve internal order and security. *Bell v. Wolfish*, 441 U.S. 520 (1979). Since the decision to transfer the plaintiff is supported by a valid reason, the fact that it may have temporarily hindered the plaintiff's ability to file papers in this Court does not render the transfer unlawful. *See Sher v. Coughlin*, 739 F.2d 77 (2d Cir. 1984). The plaintiff's motion for an injunction is denied.

II. Plaintiff's Motion for a Copy of Pretrial Transcripts

The plaintiff has requested "from this Court a copy of all the pretrial transcripts, except from when Attorney Brian Smith was representing [him]." Plaintiff's Motion.

Since the plaintiff has brought this action *in forma pauperis*, the Court assumes that he wants these copies free of charge. The plaintiff provides two reasons for this request: (1) He needs the transcripts to support his motion to enjoin his transfer; and, (2) He wants to view the pretrial proceedings so he can prepare a new civil rights action.

The transcripts which the plaintiff seeks would cover proceedings held before Magistrate Eagan. Generally, the Magistrate does not record pretrial conferences or other pretrial proceedings held at Somers Prison. In short, the documents which the plaintiff seeks do not exist.

Moreover, even if these documents did exist, the plaintiff has not demonstrated a present entitlement to free copies of them. The Court is authorized to provide a transcript for a person who has been permitted to *appeal in forma pauperis* if the trial judge or circuit judge certifies that the appeal is not frivolous. 28 U.S.C. Sec. 753(f). There is no clear statutory authority which suggests that the plaintiff is entitled to any trial-related transcripts prior to an appeal from a judgment of the district court. *See Toliver v. Community Action Commission*, 613 F. Supp. 1070, 1072 (S.D.N.Y. 1985). The right to proceed *in forma pauperis* does not carry with it a right to obtain copies of court documents to search for possible errors or to use for proposed or prospective litigation. *United States v. Houghton*, 388 F. Supp. 773 (N.D. Tex. 1975).

The Plaintiff's request for a copy of the pretrial transcript is denied.

III. Defendants' Objection to Plaintiff's Jury Demand

In April, 1983, the plaintiff filed his original complaint. In that complaint, he alleged that the defendant's use of mace violated his constitutional rights. He did not request a jury trial. In April, 1985, he filed an amended complaint. This complaint added four parties and substituted one, but raised no new issues. The amended complaint contained no request for a jury trial. On July 8, 1985, the same defendants were served with a second amended complaint which included a jury demand. Although more detailed, this complaint contained no new issues.

A plaintiff must demand a jury trial on the issue no later than ten days after the service of the last pleading directed to such issue. Fed. R. Civ. P. 38(b). Failure to make a timely demand constitutes a waiver of that right on all issues in the complaint. Fed. R. Civ. P. 38(d). A subsequent amendment of the original complaint does not revive the right to a jury trial unless the amendment changes the issues set forth in the original complaint. *Lanza v. Drexel and Co.*, 479 F.2d 1277, 1310 (2d Cir. 1973). Likewise, the addition of a co-defendant does not automatically revive a previously waived jury trial right unless new issues are presented in the amendment. *State Mutual Life Assurance Co. of America v. Arthur Andersen and Co.*, 581 F.2d 1045, 1049 (2d Cir. 1978).

The Plaintiff did not claim his right to a jury trial until more than two years after filing his original complaint. Although his complaints have become progressively more detailed, and have added more

defendants, all have consistently set forth the constitutionality of the use of mace as the issue to be resolved. Accordingly, the plaintiff is not entitled to a jury trial.

Conclusion

1. Plaintiff's motion for an injunction is DENIED.

2. Plaintiff's motion for pretrial transcripts is DENIED.

3. Defendants' objection to plaintiff's request for a jury trial is SUSTAINED.

SO ORDERED.

Date at New Haven, Connecticut, this 22d day of December, 1986.

s/ Jose A. Cabranes
JOSE A. CABRANES
UNITED STATES
DISTRICT JUDGE

EXCERPTS FROM TRANSCRIPT OF MARCH 24, 1988 HEARING BEFORE MAGISTRATE (at pp. 3-6)

THE COURT: Good morning, ladies and gentlemen.

This morning, ladies and gentlemen, we are here on Civil No. H-83-278 (JAC). This is McCarthy vs. Carl Robinson, and the purpose of our meeting this morning is to try this matter to its conclusion.

Now, before we get started, there are a few housekeeping matters we should take up. The first is the consent to proceed before the United States Magistrate, and it has been signed by the State, but let me explain to Mr. McCarthy what that is and then he has a choice of what he wishes to do.

On cases that are assigned from a District Court Judge to Magistrate for trial, they can be done in one of two ways: They can be tried before the Magistrate sitting as the District Court Judge with the permission of both the Plaintiffs and the Defendants, and then the Magistrate enters a final order which is then appealable usually to the District Court Judge or to the Second Circuit, depending on how the form is printed and how the parties agree.

If that is not an acceptable way, then the trial continues as the Magistrate being a fact-finder, and the Magistrate makes a recommendation to the District Court Judge – in this case it is Judge Cabranes – and that's the procedure that we go through. So you have your choice at this time. It makes no difference to me. Whichever way you prefer. The State is willing to go with the Magistrate as the fact-finder, but you do not have to.

MR. McCARTHY: Okay. Then we will have to reschedule the trial; right?

THE COURT: No. We go forward either way. We go under the Magistrate being the final fact-finder or being the recommended fact-finder. Either way, we go forward.

MR. McCARTHY: I would rather have the District Court Judge hear the case.

THE COURT: All right.

MR. McCARTHY: Are we still going to hear the case?

THE COURT: We are still going to hear the case.

MR. McCARTHY: Okay.

I will just stipulate to that. I would rather have the District Court Judge hear the case.

THE COURT: All right.

Then there will be no consent. I will return to the consent form. The Court will take it and issue a recommended finding at the conclusion of the case.

MR. McCARTHY: Okay.

THE COURT: That doesn't mean you will get another trial before the District Court Judge. He has to review my findings and review my decision.

MR. McCARTHY: So I will appeal directly to him.

THE COURT: You can do that this way, too.

MR. McCARTHY: I will go like we are doing now. I would rather he heard it.

THE COURT: You are going to be heard either way.

MR. McCARTHY: I am just saying I want to make a point that I stipulate to that fact, that I don't consent.

THE COURT: You don't consent.

MR. McCARTHY: Right.

THE COURT: All right.

Then I will return this to the Clerk of the Court. Now, can you tell me, or – let me tell you how we are going to proceed so both of you will understand.

We will proceed today until 4:00 o'clock. If there are still matters to be – if it is not concluded by that time, we will again reconvene here, I believe it is next Thursday, and continue the case at that time. We are not going day to day. We have to go Thursday to Thursday.

I would like to have an idea from each side how many witnesses you have and approximately how long you think it will take. So I will start with the Plaintiff first.

Mr. McCarthy, how many witnesses do you have?

MR. McCARTHY: Okay.

I would like to call all the Defendants in this case and –

* * *

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

(Caption Omitted In Printing)

RECOMMENDED FINDINGS OF FACT AND MEMORANDUM OF DECISION

At all relevant times, the plaintiff was a prisoner at the Connecticut Correctional Institution at Somers (hereinafter CCIS). He brings this action *pro se* pursuant to 42 U.S.C. § 1983, alleging that the defendants violated his fourteenth amendment due process rights and his eighth amendment right to be free from cruel and unusual punishment when they used excessive force to remove him from his cell. Additionally, plaintiff claims that defendants committed an assault and battery against him in violation of state law. On December 22, 1986, this court determined that plaintiff's complaint and subsequent amendments set forth one issue for trial, that being: the constitutionality of defendants' use of a chemical weapon. *See Ruling on Pending Motions* at 3, 4 (filed December 22, 1986).

At the start of trial, the court noted that both Warden Robinson and Commissioner Manson are deceased. Accordingly, Warden Bronson and Commissioner Meachum were substituted in their official capacities for the deceased defendants. Additionally, plaintiff withdrew the complaint against Officers Falk, Bond, Flowers and Texeira. Thus, the sole remaining defendants are Warden Bronson, Commissioner Meachum, Lt. Tozier, Officer Mickiewicz, Officer Lusa and Officer George. Plaintiff seeks declaratory and injunctive relief, compensatory

damages in the amount of $220,000, punitive damages in the amount of $600,000 and costs.

FINDINGS OF FACT

In accordance with the provisions of 28 U.S.C. § 636(c), this matter was tried before this Magistrate over an eight day period starting March 24, 1988 and ending May 19, 1988. The following findings of fact were established by testimony elicited and exhibits submitted at trial:

1. The plaintiff is a convicted prisoner presently serving a ten to twenty year sentence for larceny in the first degree and burglary in the third degree. Additionally, plaintiff faces a six year consecutive sentence for six counts of burglary in the third degree and six counts of larceny.

2. On July 13, 1982, plaintiff was housed in cell F-36. Cell F-36 is the last cell at the end of death row. It is referred to as the "death cell" and is separated from other cells in segregation by a wall with a door.

3. In 1982, this area was used for isolation purposes where the most salient individuals were placed if they posed a threat or caused a disruption.

4. At approximately 9:00 A.M. on July 13, 1982, Lt. Tozier notified plaintiff that he would be moving to cell F-85 in administrative segregation.

5. On July 13, 1982, Lt. Tozier was director of the special offenders program which covered the segregation and protective custody units. The director of the special offenders program was responsible for all the activities in

three special units. In that capacity, Lt. Tozier was considered to be a shift supervisor and had authority to order the use of a chemical weapon.

6. Prior to July 13, 1982, Lt. Tozier received training in the use of chemical munitions at the Correctional Training Academy and as part of his supervisory training and review. He has had fourteen years of on the job training, and used chemical agents numerous times in his career.

7. Shortly after lunch, an inmate tierman for F Block named Mike Ceretta, instructed plaintiff to pack his belongings in preparation for his cell transfer. Approximately, twenty minutes later, Correctional Officer Mickiewicz visited plaintiff and asked if he was packed-up.

8. Plaintiff believed originally that Officer Mickiewicz relayed a direct order through inmate Ceretta to pack-up and prepare for his cell change. Later, when speaking directly with Officer Mickiewicz, plaintiff did not construe the instructions to pack-up as a direct order because Officer Mickiewicz did not specify that it was a direct order per se.

9. Plaintiff refused to pack his property. Instead, he indicated that he wanted to know why he was being moved and he requested to see a supervisor.

10. Officer Mickiewicz called Lt. Tozier and informed him that plaintiff refused to move. Lt. Tozier instructed Officer Mickiewicz to contact the hall keeper for help.

11. At Approximately 2:30 P.M. on July 13, 1982, plaintiff heard other inmates state that the guards were forming a "group" and "rolling".

12. Plaintiff believed the guards were coming to get him. He panicked and tied his cell door closed with pieces of clothesline and jammed a piece of plastic from a plastic spoon into the keyslot.

13. Correctional Officers Mickiewicz, Lusa, George and Flowers entered F. Block at approximately 2:30 P.M. on July 13, 1982. Before entering the death row area, they formulated a game plan for extracting plaintiff from his cell. While discussing how to remove plaintiff, the officers were joined by Lt. Tozier.

14. When the Lieutenant arrived, a description was provided of plaintiff's cell area, including the fact that plaintiff's cell bars were tied shut and that plaintiff was in an angry, agitated state.

15. It was decided that Lt. Tozier would remain out of sight of the plaintiff so as to not aggravate the situation. The officers would ask plaintiff to voluntarily come out of his cell and issue an order if necessary. If he refused, the correctional officers would enter the cell and remove the plaintiff.

16. While the correctional officers spoke with the plaintiff, Lt. Tozier remained in the proximity of F-36; positioned just outside the doorway to the annex area of F-36.

17. Plaintiff was standing in his cell holding the mattress from his bed. The officers cut the twine tied on the cell door.

18. Officer George asked plaintiff what the problem was and asked him to come out peacefully at least twice. The officers spent approximately ten to fifteen minutes trying to coax plaintiff out of his cell. Officer Mickiewicz then ordered plaintiff to come out.

19. Plaintiff refused to exit the cell and made threatening statements consisting of "You will have to come and get me," and "Someone is going to get hurt."

20. Officer Lusa approached plaintiff's cell door and placed a tear gas "duster on the bars of the door.

21. Officer Lusa was the hall keeper of F Block on July 13, 1982. As the hall keeper, Officer Lusa's duties included responding to situations involving moving inmates, troublesome inmates, hang suicides, falls, and alarms.

22. When hall keepers responded to a call to remove an inmate from a cell, they would always bring a bag with necessary tools, inclusing [sic] tear gas and mace. Officer Lusa had substantial experience with the tear gas duster and has used it on numerous occasions prior to July 13, 1982.

23. When plaintiff saw the duster, he used the mattress to shield himself and made no further response.

24. Plaintiff suddenly lunged toward a specific area of his cell. On the belief that plaintiff was lunging for a weapon, and at the verbal command of Lt. Tozier, Officer Lusa deployed the tear gas duster.

25. Officer Lusa sprayed the duster once for about three seconds while standing approximately six feet from

the plaintiff. A fog-like dust enveloped plaintiff and he ceased to resist.

26. The piece of plastic was freed from the lock and Officers Mickiewicz, George and Lusa entered the gas-filled cell. Officer Mickiewicz handcuffed plaintiff. Physical force was not used as plaintiff did not resist at that point.

27. Officer Mickiewicz quickly escorted plaintiff to isolation cell F-43 followed by the other officers. The officers and plaintiff were in the gassed cell for approximately two to five minutes.

28. The door of cell F-36 was closed and locked so that tear gas dust would not disperse and to protect the plaintiff's property. Windows were opened and fans were in place.

29. At approximately 3:30 P.M., plaintiff arrived at the isolation area where his handcuffs were removed. He was stripped, searched, and then put into cell F-43. No rashes, burns or signs of redness were observed on plaintiff's body.

30. When plaintiff arrived in cell F-43 he requested and demanded a shower. Because plaintiff was still in an agitated and violent state of mind, Lt. Tozier decided it would not be appropriate to take plaintiff out of F-43 immediately following the gassing incident. Plaintiff was informed that he would not get a shower until he calmed down.

31. Plaintiff was not in physical danger because there was hot and cold running water in plaintiff's cell. Lt. Tozier did not order that plaintiff's water be shut off.

Considering the amount of gas used and the availability of water, there was no need to send a medic to see plaintiff at that time.

32. Approximately three hours after the incident, when Lt. Tozier was sure that plaintiff had calmed down sufficiently, he authorized the second shift supervisor to shower plaintiff.

33. Lingering gas fumes filtered into the F Block segregation unit annoying some of the inmates and inciting them to throw milk cartons and refuse from their cells. There was no large scale disturbance.

34. At approximately 4:00 P.M., Officer Dudek came on duty for the second shift in F Block. At that time, there was no smell of tear gas in the segregation unit.

35. Lt. Tozier left a verbal order for the second shift officers to search plaintiff's cell. At approximately 9:30 P.M., Officers Dudek and Higgins went to search cell F-36.

36. When correctional officers pack and secure an inmate's belongings, they generally look for contraband as well. Two officers always enter an inmate's cell together when performing a search or "shakedown" so that one officer acts as a witness to the actions of the other officer.

37. When they arrived at the partitioned separating the death row cells from the segregation cells, they found the door locked and secured.

38. Officers Dudek and Higgins unlocked the door, entered the death row area and locked the door behind them. They packed-up plaintiff's property and exited

from plaintiff's cell into the death chamber (where property is stored).

39. In the death chamber, they searched through plaintiff's property. Officer Higgins inspected a cereal box in which he found a shank, or homemade knife, stuck underneath a flap of the box. The shank was approximately ten inches long with a six inch blade. Officer Dudek took the shank, put it in his pocket, and turned it over to the shift supervisor.

40. Between 3:00 P.M. and 12:00 A.M., there was no opportunity for anyone to enter plaintiff's cell. The outer door to plaintiff's cell area was locked and all inmate tiermen were locked in their cells for a "count" at the time of the incident and at 4:00 P.M. when Officer Dudek came on duty.

41. On the evening of July 13, 1982, Nurse Rogal routinely toured the segregation unit. At approximately 9:30 that same night, plaintiff received a medical exam and was sent Caladryl ointment in response to his complaint of itchy shin.

42. On the following day, July 14, 1982, Nurse Sharon Snyder routinely toured the segregation unit. Plaintiff asked Nurse Snyder for some Tylenol. He did not complain of chemical burns or skin irritations.

43. On July 15, 1982, Dr. Carl Johnson and Nurse Sharon Snyder toured the segregation unit. Dr. Johnson examined plaintiff and noted plaintiff's complaint as a questionable chemical burn under his right arm, up his side, and in his hair. Dr. Johnson prescribed "kenalog" cream.

44. On July 16, 1982, during the course of Nurse Snyder's daily visit to segregation, plaintiff requested a decongestant.

45. On July 19, 1982, plaintiff requested more Tylenol from Nurse Snyder.

46. On July 22, 1982, during another "seg check" by Dr. Johnson, plaintiff complained of an underarm irritation. The doctor prescribed cream to be applied three times a day.

47. 47. [sic] On July 26, 1982, plaintiff's prescription for decongestion was refilled.

48. Plaintiff was not taken to the hospital for treatment after the gassing incident. To the extent that plaintiff's injuries were treated with ointments and Tylenol, they were insignificant in nature.

49. In 1982, only two chemical weapons were utilized at CCIS; mace and the 271 tear gas duster. At that time, the word "duster" had a specific meaning and was used to refer to the 271 tear gas duster. The 271 duster was designed for interior use and specifically for use in correctional facilities.

50. The active chemical agent in mace and the 271 tear gas duster is choloracetophenone, or "CN". CN is a lacrimating agent which induces profuse watering of the eyes. The canister containing the CN arrived at CCIS premixed by the manufacturer. The mixture consists of "anti-caking agent" and 64% CN. There was no way to influence the chemical mixture inside the canister.

51. The proper deployment method of the 271 duster is to aim waist high at the individual. When a

barrier is used as a shield, the 271 duster should be aimed at the barrier.

52. In order for mace to be effective, it must make contact with the skin. When an inmate uses a blanket or bedding materials as a barricade, mace is considered ineffective and its use could place the officers at a risk.

53. Generally, the 271 duster was used as a preventive measure. When properly used, the 271 duster was not considered any more or less dangerous than mace or any other device in law enforcement.

54. The effect of the tear gas dust is to cause the eyes to burn and sting. The feeling is uncomfortable and unpleasant, but the sensation is short-term and does not cause lasting damage.

55. The tear gas dust is removed by shaking it from exposed clothing and applying water to the skin. Because the dust is very superficial, water removal is the recognized first aid treatment for chemical agent exposure.

56. On July 13, 1982, there were administrative directives in effect authorizing the use of force and the use of chemical weapons against inmates.

57. When deciding whether to authorize the use of a chemical weapon, a supervising officer considers a number of factors, including: (i) the potentially assaultive and aggressive nature of the inmate, (ii) whether the inmate is in a cell refusing to come out, and (iii) whether the inmate is threatening the officers with physical harm.

58. Additionally, there are three or four reasons for using a chemical weapon on an inmate. One reason is to

aid in the movement of an inmate from an area that they control to an area controlled by the officers.

59. In light of the kind of bars on the plaintiff's cell, the placement of foreign objects in the keyway, and the clothesline tied on the cell door, plaintiff was in control of the area of his cell.

60. Because plaintiff could not be evacuated in the event of a fire or emergency, it would not have been proper or appropriate for defendants to walk away from the situation.

61. On June 2, 1982, plaintiff wrote to Assistant Warden Bronson and Commissioner Manson complaining of harrassment [sic] by Lt. Tozier and requesting reconsideration of his segregation status.

62. Assistant Warden Bronson responded stating that he found Lt. Tozier's actions were appropriate and consistent with procedure. Additionally, he informed plaintiff that the Special Offenders Program classification committee would recommend his return to general population if he remained misconduct free for a period of thirty days.

63. Commissioner Manson informed plaintiff that his placement in segregation was appropriate due to plaintiff's ongoing and consistent disciplinary record. The Commissioner indicated that plaintiff was in the least desirable of cells because he destroyed state property. Additionally, Commissioner Manson noted that plaintiff's record in segregation had been "horrendous." When plaintiff demonstrated an ability to abide by prison rules, he would be released into population. In the interim,

plaintiff was instructed that he should not "put [his] feelings on Lt. Tozier or any other person, staff or inmate."

64. Lt. Tozier was unaware of plaintiff's letters to the Assistant Warden and the Commissioner. He received no reprimand with respect to plaintiff's allegations. In fourteen years of service, Lt. Tozier was never reprimanded in relation to his duties.

65. On July 13, 1982, Lt. Tozier made a discretionary decision to use force based on the need to maintain order, discipline, and the security of F Block and the institution. The decision was made only after Lt. Tozier arrived on the scene. Lt. Tozier's decision was based on his evaluation of the situation and his knowledge of the inmate.

66. As director of the Special Offenders Program, Lt. Tozier reviewed plaintiff's misconduct record for special offender classification meetings. From a period of 1/6/82 to 7/13/82, plaintiff received approximately fifteen misconduct reports involving charges of tampering with locking devices, destroying state property, possession of drugs and intoxicating substances and possession of a weapon.

67. Lt. Tozier's decision to use a chemical agent was not made in order to punish plaintiff, cause unnecessary pain, or in retaliation for the letters plaintiff sent.

68. The primary reason for the chain of events that occurred on July 13, 1982 was plaintiff's refusal to obey lawful orders issued by the defendants. When an inmate is ordered to change cells, he must follow the order then

make his appeal to the supervisor. Plaintiff failed to comply with a lawful order and made threatening statements.

69. Under the circumstances, use of the 271 tear gas duster was in the best interest of those involved. The 271 duster was safer and more humane than physical force which might have resulted in injury to the officers as well as the plaintiff. The barricade raised by plaintiff necessitated using the 271 duster rather than mace. Under the circumstances, there were not less forceful means to remove plaintiff from his cell.

70. The use of the 271 duster was appropriate and proper. An excessive amount of gas was not expelled. The use of force was reasonably related to the need to remove plaintiff from his cell and restore order and discipline to the block.

DISCUSSION

As stated above, the plaintiff claims that defendants used excessive force to remove him from his cell and caused serious injuries as a result. Plaintiff asserts that defendants' actions subjected him to cruel and unusual punishment in violation of the eighth amendment and deprived him of substantial liberties without due process of law in violation of the fourteenth amendment.

I. Eighth Amendment Claim

The Second Circuit has set forth the following factors as useful in determining whether alleged excessive force amounts to a constitutional violation.

> In determining whether the constitutional line has been crossed, a court must look to such factors as the need for the application of force, the relationship between the need and the amount of force that was used, the extent of the injury inflicted, and whether force was applied in a good faith effort to maintain or resotre [sic] discipline or maliciously and sadistically for the very purpose of causing harm.

Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir.), *cert. denied*, 414 U.S. 1033 (1973).

When proving an eighth amendment violation, the plaintiff has an extremely difficult burden. " 'After incarceration, only the 'unnecessary and wanton infliction of pain' . . . constitutes cruel and unusual punishment forbidden by the Eighth Amendment.' " *Whitley v. Albers*, 475 U.S. 312, 319 (1986) (quoting *Ingraham v. Wright*, 430 U.S. 651, 670 (1977)). "[C]onduct that does not purport to be punishment at all must involve more than ordinary lack of due care for the prisoner's interests or safety." *Id.* Thus, the infliction of pain as a security measure is not a constitutional violation simply because it may later appear unreasonable. *Id.* The test turns on "whether force [was] applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." *Glick*, 481 F.2d at 1033.

Examination of the record in this case does not reveal credible evidence to support plaintiff's claims. The record indicates that plaintiff was notified at least twice that he would be changing cells sometime during the day of July 13, 1982. Plaintiff was asked repeatedly to move voluntarily and then was ordered to come out of cell. Regardless of his justifications for refusing to move, plaintiff had

no constitutionally protected right to disobey a lawful order from a prison official. Nor did plaintiff have a constitutional right to know why he was being moved. Finally, plaintiff had no constitutional right to remain incarcerated in a particular cell. *See Olim v. Wakinekona*, 461 U.S. 238 (1983); *Burr v. Duckworth*, 547 F. Supp. 192, 197 (N.D. Ind. 1982), *aff'd mem.*, 746 F.2d 1482 (7th Cir. 1984).

Plaintiff contends that defendants used the 271 duster solely as a disciplinary tool because he "stray[ed] from the letter of the prison code." Clearly, this was not a situation where force was used to punish plaintiff for violating the Code of Penal Discipline. Plaintiff's actions in barricading himself in his cell and jamming the cell lock created a threat to the safety of the institution as well as to himself. In the event of an emergency or a fire, plaintiff could not have been evacuated quickly and safely. Additionally, plaintiff made threatening comments to the officers and had a history of misconduct suggesting a potentially assaultive or aggressive nature. In light of these circumstances, this court cannot find that use of the chemical weapon was unauthorized or unreasonable.

Plaintiff alleges that the amount of chemical agent used was excessive and resulted in severe burns and open, raw, sores. However, the record indicates that Officer Lusa sprayed the tear gas for approximately two to three seconds. Less than one hour later, when Officer Dudek reported for duty, there was no smell of tear gas outside the segregation unit. Further, none of the officers who participated in the incident required medical treatment or showers after being exposed to the same amount of gas. Moreover, plaintiff's medical records indicate that

plaintiff experienced only "itchy skin" a few hours after the incident and minor skin irritation lasting approximately one week. The skin rashes were treated with creams and ointments and did not require transferring plaintiff to an outside facility or the hospital unit. On at least three occasions during the two weeks following the incident, plaintiff did not even mention discomfort from the gassing and requested only Tylenol and decongestants from the medical staff.

Lastly, plaintiff argues that Lt. Tozier's decision to use the 271 tear gas duster was malicious, retaliatory, and made in bad faith. There is no evidence in the record to support such a claim. Of the fifteen misconduct reports received by palintiff [sic] prior to the incident, only one had been issued by Lt. Tozier. Furthermore, plaintiff himself testified that while other inmates and guards called him names and verbally abused him, Lt. Tozier never uttered derogatory remarks toward plaintiff. Finally, in response to plaintiff's complaints regarding Lt. Tozier, both Commissioner Manson, and Warden Bronson found the Lieutenant's behavior to be appropriate and beyond reproach. Accordingly, plaintiff has failed to demonstrate that the use of force was applied maliciously or sadistically for the very purpose of causing harm.

II. Fourteenth Amendment Claim

Plaintiff further proposes liability alleging that he was deprived of a state created liberty interest without due process of law in violation of the fourteenth amendment. It would be difficult to comprehend conduct which would "shock the conscience" of this court and so violate

the fourteenth amendment, yet not also be " 'inconsistent with contemporary standards of decency' and 'repugnant to the conscience of mankind,' in violation of the Eighth." *Whitley*, 475 U.S. at 327 (quoting *Estelle v. Gamble*, 429 U.S. 97, 103, 106 (1976)) (citation omitted).

Simply stated, in the prison security context, "the Due Process Clause affords [the plaintiff] no greater protection than does the Cruel and Unusual Punishment Clause." *Whitley*, 475 U.S. at 327. Plaintiff has failed to demonstrate that defendants' use of a chemical weapon was unreasonable or unauthorized. Accordingly, the court concludes that the due process clause does not serve as an alternative basis for liability.

CONCLUSION

For the foregoing reasons, plaintiff has failed to establish that defendants' use of a chemical weapon violated his constitutional rights under the eighth or the fourteenth amendments. Accordingly, judgment shall enter in favor of the defendants.

Any objections to this report and recommendation must be filed with the Clerk of Courts within fifteen (15) days of receipt of this notice. Failure to file objections within the specified time waives the right to appeal the District Court's order. 28 U.S.C. § 636.

Dated at Hartford, Connecticut, this 22nd day of May 1989.

/s/ F. Owen Eagan
F. Owen Eagan
United States Magistrate

Absent a timely objection to the Magistrate's recommended ruling, *see* 28 U.S.C. § 636(b)(1) and Rule 2 of the Local Rules for U.S. Magistrates (D. Conn.), and for the reasons stated by the Magistrate, the Recommended Findings of Fact and Memorandum of Decision is hereby accepted and adopted as the decision of the court. Accordingly, judgment shall enter in favor of the defendants. It is so ordered.

New Haven, CT June 19, 1989

/s/ Jose A. Cabranes
Jose A. Cabranes, U.S.D.J.

UNITED STATES DISTRICT COURT

——— DISTRICT OF CONNECTICUT

JOHN J. McCARTHY

JUDGMENT IN A CIVIL CASE

V.

CARL ROBINSON, Warden, GEORGE BRONSON, Warden, LT. STEVE LOZIER, OFFICER PAUL LUSA and OFFICER MICKIEWICZ

CASE NUMBER: H-83-278 (JAC) Eg

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] **Decision by Court.** This action came to trial before the Court. The issues have been tried and a decision has been rendered, by the Honorable F. Owen Eagan, United States Magistrate, and accepted and adopted by the Honorable Jose A. Cabranes, U.S. District Judge, IT IS ORDERED AND ADJUDGED that judgment be and is hereby entered in favor of the defendants and the plaintiff's complaint is dismissed.

June 19, 1989
Date

KEVIN F. ROWE
Clerk

/s/ Frances J. illegible
(By) Deputy Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT
(Caption Omitted In Printing)
RULING ON PENDING MOTIONS

This is a *pro se* action brought under 42 U.S.C. § 1983 by a plaintiff who at all relevant times was a prisoner at the Connecticut Correctional Institution at Somers ("Somers"). On April 11, 1983, the same date the complaint was filed, I referred this case to Magistrate F. Owen Eagan for all pretrial proceedings. On February 28, 1985 plaintiff, acting *pro se*, and defendant's counsel both signed a "Consent to Proceed Before a United States Magistrate" form consenting to trial before a United States Magistrate pursuant to 28 U.S.C. § 636(c), and on March 5, 1985 I approved this form. Trial before Magistrate Eagan began at Somers on March 24, 1988, at which point plaintiff refused to sign another "Consent to Proceed Before a United States Magistrate" form. After the close of trial and briefing by both sides, Magistrate Eagan on May 23, 1989 issued a document styled "Recommended Findings of Fact and Memorandum of Decision," and on June 19, 1989 I endorsed this document as follows:

> Absent a timely objection to the Magistrate's recommended ruling, *see* 28 U.S.C. § 636(b)(1) and Rule 2 of the Local Rules for U.S. Magistrates (D. Conn.), and for the reasons stated by the Magistrate, the Recommended Findings of Fact and Memorandum of Decision is hereby accepted and adopted as the decision of the court. Accordingly, judgment shall enter in favor of the defendants. It is so ordered.

The Clerk entered judgment in favor of the defendants on June 19, 1989. Both sides have now filed various motions.

Because my June 19 endorsement order contained a citation to an inappropriate subsection of the United States Code, and because it was not particularly clear in any event, I must at the outset discuss the procedural posture in which this case now appears. My March 5, 1985 order approving the "Consent to Proceed Before a United States Magistrate" form had the necessary effect of amending the referral to Magistrate Eagan to include the conducting of the trial of this case, pursuant to 28 U.S.C. § 636(c) and Rule 4 of the Local Rules for United States Magistrates (D. Conn.) ("Local Rules"). Because plaintiff refused to sign another "Consent to Proceed Before a United States Magistrate" form on the first day of trial, however, Magistrate Eagan chose not to direct the entry of judgment after trial, as he was authorized to do by 28 U.S.C. § 636(c)(1) and Rule 4(A)(1) of the Local Rules. Instead, Magistrate Eagan issued a document entitled "*Recommended* Findings of Fact and Memorandum of Decision," essentially acting as a special master pursuant to his powers under 28 U.S.C. § 636(b)(2) and Rule 1(C)(5) of the Local Rules. This prudent course of action by Magistrate Eagan was entirely appropriate.[1] Absent a

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[1] I believe it also would have been perfectly proper for Magistrate Eagan to continue to act under 28 U.S.C. § 636(c) and Rule 4 of the Local Rules. Once a case is referred to a magistrate under § 636(c), a party cannot withdraw his consent and demand that the case return to the district judge. *Fellman v. Fireman's Fund Insurance Company*, 735 F.2d 55, 57-58 (2d Cir. 1984). Such a rule is necessary to avoid "magistrate shopping" by parties, withdrawing their consent if they are unhappy with the particular magistrate to whom the referral went.

timely objection, *see* Fed. R. Civ. P. 53(e)(2) and Rule 2(c) of the Local Rules, I adopted the findings of fact recommended by Magistrate Eagan. These facts clearly compelled the entry of judgment in favor of defendants.

With this overview of the procedural posture of the case, I can now turn to the pending motions:

1. *Plaintiffs' [sic] Motion for Relief From Judgement [sic] (filed June 29, 1989)* – Plaintiff moves, presumably under Fed. R. Civ. P. 60(b)(6), for relief from the judgment entered June 19, 1989, on the grounds that he did not receive Magistrate Eagan's Recommended Findings of Fact and Memorandum of Decision until June 7, 1989 and therefore the court did not give him sufficient time to file objections to that report prior to entering judgment. Plaintiff did file an objection to the Recommended Findings of Fact and Memorandum of decision on June 22, 1989.

Assuming for the argument only that valid objections to the Recommended Findings of Fact and Memorandum of Decision would justify relief from the judgment under Fed. R. Civ. P. 60(b)(6), or would justify alteration of the judgment under Fed. R. Civ. P. 59(e), I still cannot grant this motion. I am required to accept the findings of fact recommended by Magistrate Eagan in this case, in which he essentially acted as a special master, unless they are "clearly erroneous." *See* Fed. R. Civ. P. 53(e)(2); *Equal Employment Opportunity Commission v. Local 638*, 700 F. Supp. 739, 743 n.1 (S.D.N.Y. 1988). I have thoroughly reviewed the objections raised by plaintiff in Plaintiffs [sic] Objection to the Magistrates' Recomended [sic] Findings and Memorandum of Decision Dated May 23/1989

(F. Owen Eagan) (filed June 22, 1989) and in Plaintiffs' [sic] Memorandum in Support of his Objection to the Magistrates' Recomended [sic] Findings of Facts and Memorandum of Decision Dated May 23/1989 Re: 28 U.S.C. 636(c) (filed June 22, 1989).[2] I cannot conclude that any of the factual findings challenged by plaintiff is "clearly erroneous." Even upon a *de novo* determination I would reach the same conclusions as the Magistrate regarding the matters to which there has been objection.

Accordingly, Plaintiffs [sic] Objection to the Magistrates' Recomended [sic] Findings and Memorandum of Decision Dated May 23/1989 (F. Owen Eagan) (filed June 22, 1989) is OVERRULED. Plaintiffs' [sic] Motion for Relief From Judgement [sic] (filed June 29, 1989) is therefore DENIED.

2. *Plaintiffs' [sic] Motion for a Stay of Judgement [sic] Re: F.R.Civ.P. Rule 74 et seq (filed June 22, 1989), Notice of Appeal to District Court Judge (filed June 22, 1989), Plaintiffs' [sic] Motion for a Copy of Transcript and Production of Transcripts Pursuant to F. R. Civ. P. rule 75(b)(2) (filed June 22, 1989)* – Plaintiff "appeals" the "decision" of Magistrate Eagan to the district judge, and moves for transcripts for his "appeal" and a stay of the judgment pending the "appeal." As noted above, however, Magistrate Eagan did not issue a decision in this case under 28 U.S.C. § 636(c), so no "appeal" can be taken to the district judge. Therefore this "appeal" must be DISMISSED and

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[2] Aiding me greatly in conducting this review was the thorough Defendants' Memorandum in Opposition to Objections to the Magistrate's Recommended Findings of Fact and Memorandum of Decision (filed July 12, 1989).

the motions DENIED. The judgment in this case was entered upon my order, and any appeal from that judgment must be taken to the Court of Appeals.

3. *Motion for Order (filed July 12, 1989)* – Defendants seek an order (under 28 U.S.C. § 636(c)(5)[3], 28 U.S.C. § 1915(a), and 28 U.S.C. § 753(f)) certifying that an appeal in this case is frivolous, not taken in good faith, and lacking in probable cause. This motion is DENIED. Because of the unique procedural posture of this case I cannot say that an appeal to the Court of Appeals would not be taken in good faith within the meaning of § 1915(a).

4. *Plaintiffs' [sic] Motion for the Court Reporter to Prepare the Transcripts of this Case for the Purpose of Appeal (filed August 15, 1989)* – Plaintiff moves for an order directing the court reporter to prepare the entire transcript of the trial proceedings and deliver one copy to the Court Clerk and one copy to the plaintiff. Presumably plaintiff is requesting that the United States *pay the fees* for preparing these transcripts, pursuant to 28 U.S.C. § 753(f). This motion must be DENIED, as I cannot certify that "the appeal is not frivolous (but presents a substantial question)" within the meaning of § 753(f).[4] In addition I note that the record of this case as it now stands is

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[3] The motion cites "28 U.S.C. § 636(4)(5)," but since no such subsection exists I assume defendants mean § 636(c)(5).

[4] Although I have denied defendants' motion to certify that an appeal would not be taken in good faith within the meaning of 28 U.S.C. § 1915(a), I am not willing to certify that an appeal presents a substantial question for review within the meaning of 28 U.S.C. § 753(f). I am not certifying anything at all regarding this appeal.

ample to present to the Court of Appeals any issues regarding the procedural posture of this case, the only issues from which an appeal could be taken in good faith within the meaning of 28 U.S.C. § 1915(a).

5. *Plaintiff/Appellants [sic] Motion to Proceed on Appeal In Forma Pauperis (filed August 15, 1989)* – Plaintiff moves for an order, pursuant to Fed. R. App. P. 24(a), for leave to proceed on appeal *in forma pauperis*. Because plaintiff makes an adequate showing of poverty, that motion is GRANTED.

CONCLUSION

To summarize: Plaintiffs [sic] Objection to the Magistrates' Recomended [sic] Findings and Memorandum of Decision Dated May 23/1989 (F. Owen Eagan) (filed June 22, 1989) is OVERRULED. Plaintiffs' [sic] Motion for Relief From Judgement [sic] (filed June 29, 1989) is DENIED. The Notice of Appeal to District Court Judge (filed June 22, 1989) is DISMISSED. Plaintiffs' [sic] Motion for a Stay of Judgement [sic] Re: F.R.Civ.P. Rule 74 et seq (filed June 22, 1989) is DENIED. Plaintiffs' [sic] Motion for a Copy of Transcript and Production of Transcripts Pursuant to F. R. Civ. P. rule 75(b)(2) (filed June 22, 1989) is DENIED. The Motion for Order (filed July 12, 1989) is DENIED. Plaintiffs' [sic] Motion for the Court Reporter to Prepare the Transcripts of this Case for the Purpose of Appeal (filed August 15, 1989) is DENIED. Plaintiff/Appellants [sic] Motion to Proceed on Appeal In Forma Pauperis (filed August 15, 1989) is GRANTED.

It is so ordered.

Dated at New Haven, Connecticut, this 17th day of August 1989.

/s/ José A. Cabranes
José A. Cabranes
United States District Judge

United States Court of Appeals,
Second Circuit.

John J. McCARTHY,
Plaintiff-Appellant,

v.

George BRONSON, Warden, Lt. Steve T. Ozier, Officer Paul Lusa, and Officer Michiewicz, Individually and in their official capacities as Officers of the Connecticut Department of Correction. Defendants-Appellees.

No. 651. Docket 89-2389.

Submitted March 1, 1990.

Decided June 22, 1990.

Before OAKES, Chief Judge, NEWMAN and WALKER, Circuit Judges.

JON O. NEWMAN, Circuit Judge:

John J. McCarthy, a state prisoner, appeals *pro se* from the June 19, 1989, judgment of the District Court for the District of Connecticut (José A. Cabranes, Judge) in favor of the defendant state prison officials. McCarthy sued under 42 U.S.C. § 1983 (1982), alleging unlawful removal from his cell and use excessive force. The judgment was entered after a hearing conducted by Magistrate F. Owen Eagan. The case is complicated by some uncertainty as to the authority of the Magistrate in recommending proposed findings to the District Judge and the authority of the District Judge in approving those recommended findings. The appeal challenges procedural irregularities concerning the reference to the Magistrate, the lack of a jury trial, the denial

of a free copy of a hearing transcript, and the merits of the fact-finding. We affirm.

Before setting forth the procedural facts, it will be helpful to outline pertinent provisions of the Federal Magistrates Act, 28 U.S.C. §§ 631-39 (1982 & Supp. V 1987). Four types of reference from a district judge to a magistrate are implicated in this case. First, subsection 636(b)(1) permits a judge to designate a magistrate to handle pretrial matters, with the Magistrate authorized by subsection 636(b)(1)(A) to rule on most pretrial motions and authorized by subsection 636(b)(1)(B) to recommend rulings on motions excepted from subsection 636(b)(1)(A). Second, subsection 636(b)(1)(B) also permits a judge to designate a magistrate "to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court . . . of prisoner petitions challenging conditions of confinement." Third, subsection 636(b)(2) permits a judge to designate a magistrate "to serve as a special master pursuant to the applicable provisions of [Title 28] and the Federal Rules of Civil Procedure." This subsection also permits a judge to designate a magistrate to serve as a special master in any civil case, upon consent of the parties, without regard to Fed.R.Civ. P. 53(b), which limits use of a master to exceptional cases. Fourth, subsection 636(c) permits a magistrate, upon consent of the parties, to try any civil case and render a judgment.

Background

Plaintiff's original complaint, filed in April, 1983, alleged that various officials at the Connecticut Correctional Institution at Somers had ordered or carried out his forcible removal from his prison cell by means of tear gas and excessive force, in violation of the Eighth and Fourteenth Amendments. The complaint named only Warden Robinson as a defendant and made no demand for a jury trial. Shortly after the complaint was filed, Judge Cabranes referred the case to Magistrate Eagan for pretrial proceedings under 28 U.S.C. § 636(b)(1)(A), a reference that was soon broadened. On February 28, 1985, in open court and plaintiff and defendant's counsel executed a standard consent form, agreeing to have the case tried by a magistrate, pursuant to 28 U.S.C. § 636(c), and electing to take any appeal from the magistrate's judgment to the district judge, pursuant to § 636(c)(4). At that time, the Magistrate explained to McCarthy that the trial would be held by the Magistrate at Somers Prison without a jury. McCarthy did not object. Conducting non-jury trials at the prison frequently benefits a prisoner-claimant, since witnesses and documents, needed unexpectedly, are more accessible. On March 5, 1985, Judge Cabranes entered an order referring the case to Magistrate Eagan "for all further proceedings and the entry of judgment in accordance with Title 28, § 636(c)."

On April 12, 1985, McCarthy filed an amended complaint. This complaint added several defendants but did not alter the substantive allegations. It made no jury demand. On July 2, 1985, he filed a second amended complaint, against adding parties but not altering his substantive allegations. This complaint contained a jury

demand. Defendants filed their answer to the second amended complaint on August 26, 1985. No answer had been filed to the prior complaints.

On October 23, 1986, defendants filed papers opposing plaintiff's jury demand, contending, among other things, that McCarthy had agreed to a non-jury trial before the Magistrate on February 28, 1985. On December 22, 1986, Judge Cabranes ruled that plaintiff was not entitled to a jury trial; he relied on the absence of a timely jury demand, *see* Fed.R.Civ.P. 38(b), (d), and noted that the right to a jury trial, once waived, is not revived by an amended complaint that raises no new issues, *see Lanza v. Drexel & Co.*, 479 F.2d 1277, 1310-11 (2d Cir.1973) (in banc). On October 22, 1987, McCarthy moved for a jury trial; the Magistrate recommended denial based on the District Judge's 1986 ruling, and Judge Cabranes adopted this recommendation on January 29, 1988.

On March 24, 1988, plaintiff appeared before the Magistrate for a bench trial at Somers Prison. At the start of the trial, the Magistrate sought a second written consent to proceed under subsection 636(c), even though a first consent had been executed on February 28, 1985. McCarthy refused. Apparently, the Magistrate construed McCarthy's refusal to sign the second consent form as a motion to withdraw the original consent and granted the motion. Magistrate Eagan then conducted an eight-day trial at the conclusion of which he issued a decision entitled "Recommended Findings of Fact and Memorandum of Decision." He recommended detailed findings of fact and ultimate conclusions that excessive force had not been used and that no unlawful action had occurred.

When the matter reached the District Court, Judge Cabranes accepted the recommended findings and ordered judgment for the defendants. His endorsement of the Magistrate's proposed findings reflected the Judge's understanding that the matter had been referred under subsection 636(b)(1), *i.e.*, referred for recommended findings. However, in ruling on post-judgment motions, Judge Cabranes amended the citation to subsection 636(b)(1) and stated that after allowing the plaintiff to withdraw his consent, Magistrate Eagan had "essentially act[ed] as a special master pursuant to his powers under 28 U.S.C. § 636(b)(2) and Rule 1(C)(5) of the Local Rules." Judge Cabranes then adopted the Magistrate's recommended findings, acting under Fed.R.Civ.P. 53(e)(2), which requires a district judge to accept a special master's findings of fact unless clearly erroneous. Finally, the District Judge added, "Even upon a *de novo* determination I would reach the same conclusions as the Magistrate." All motions for post-judgment relief were denied.

Discussion

The tangled sequence of events has created some problems, but none that impairs the validity of the judgment rejecting plaintiff's claims on their merits.

1. *The Authority of the Magistrate.*

The parties' February 28, 1985, consent to have the matter tried by the Magistrate pursuant to subsection 636(c) was entirely valid. Once given, that consent may be withdrawn on the Court's own motion "for good cause

shown" or on request of a party who shows "extraordinary circumstances" warranting such relief. 28 U.S.C. § 636(c)(6); *see Fellman v. Fireman's Fund Insurance Co.*, 735 F.2d 55, 57-58 (2d Cir.1984). No such circumstances existed in this case. The Magistrate therefore could have proceeded under the original 636(c) reference, made findings, and entered judgment. However, he elected not to do so, preferring instead to permit McCarthy to withdraw consent to the 636(c) reference.

Having vacated the 636(c) reference, the Magistrate then used the authority of subsection 636(b)(1)(B) to conduct a hearing and recommend proposed findings of fact concerning "prisoner petitions challenging conditions of confinement." Whether he acted permissibly is our initial inquiry. The matter had originally been referred to the Magistrate for pretrial purposes, under the authority of subsections 636(b)(1)(A) and (B). Arguably, vacating the 636(c) reference left the Magistrate with only the pretrial assignment he had originally been given, but we do not think he was required to take such a narrow view of his authority. With complete propriety, he could have declined to vacate the 636(c) consent and adjudicated the merits definitively. He was surely entitled to take the lesser step of hearing the evidence and submitting recommended findings to the District Judge. The parties' consent is not required for using that procedure, and it is obvious, from the District Judge's subsequent approval of the Magistrate's findings, that the Judge welcomed the Magistrate's help. It would be a needless ritual now to require the District Judge formally to refer the matter under the "prisoner petition" clause of subsection 636(b)(1)(B). The Judge's adoption of the recommended

findings demonstrates that the Magistrate was acting entirely in conformity with authority the Judge wished him to exercise.

A more substantial question is whether McCarthy's lawsuit is a petition "challenging the conditions of confinement" within the meaning of subsection 636(b)(1)(B). Subsection 636(b)(1)(B) was added in 1976 as part of a broadening of the authority of magistrates. Act of Oct. 21, 1976, Pub.L. 94-577, 90 Stat. 2729. The House Report does not explain the category "prisoner petitions challenging conditions of confinement" but does refer to "petitions under section 1983 of Title 42." H.R.Rep. No. 1609, 94th Cong., 2d Sess. 11, *reprinted in* 1976 U.S. Code Cong. & Admin.News 6162, 6171. Most courts have construed the phrase broadly to include almost any complaint made by a prisoner against prison officials, *see Branch v. Martin*, 886 F.2d 1043, 1045 n. 1 (8th Cir.1989) (collecting cases). However, there is a minority view that has focused on the phrase "conditions of confinement" and concluded that it covers only challenges to pervasive prison conditions and excludes claims concerning specific episodes of misconduct by prison officials. *See e.g., Houghton v. Osborne*, 834 F.2d 745 (9th Cir.1987); *Hill v. Jenkins*, 603 F.2d 1256, 1259 (7th Cir.1979) (Swygert, J., concurring).

We see no reason why a Magistrate with clear authority to hold hearings and recommend findings as to the unconstitutionality of continuing prison conditions may not perform a similar function as to specific episodes of unconstitutional conduct by prison officials. The phrase "conditions of confinement" appears not to have been selected as a limitation to preclude episodes of misconduct, but rather as a generalized category covering all

grievances occurring during prison confinement. This meaning emerges from comparing the phrase with the immediately preceding category in subsection 636(b)(1)(B) that covers "applications for posttrial relief made by individuals convicted of criminal offenses." Congress evidently wished magistrates to assist district judges with respect to all prisoner claims and selected phrases to describe the two broad categories of prisoner claims cognizable under 28 U.S.C. §§ 2254, 2255 (challenges to convictions) and 42 U.S.C. § 1983 (challenges to conditions of confinement). *See generally Preiser v. Rodriguez*, 411 U.S. 475, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973).

The Magistrate was therefore entitled to hold a hearing on McCarthy's complaint and submit recommended findings to the District Judge.

2. *The Authority of the District Judge.* After initially viewing the Magistrate's proposed findings as submitted under subsection 636(b)(1) and adopting them, Judge Cabranes altered his view in his post-judgment ruling and considered the Magistrate's findings to be "essentially" those of a special master acting under subsection 636(b)(2). Then, explicitly referring to Rule 53(e)(2) of the Federal Rules of Civil Procedure, governing judicial consideration of a master's findings in a nonjury case, the District Judge accepted the findings as not clearly erroneous, the standard under Rule 53(e)(2). Had the Judge stopped there, his ruling would have been infirm for two reasons.

First, the Magistrate made and forwarded his findings under subsection 636(b)(1), and that subsection

requires *de novo* review of any proposed findings to which objection was made. Though we are confident that the Magistrate would exercise the same high degree of care and conscientiousness whether his findings were to be reviewed *de novo* or under a clearly erroneous standard, we would have considerable doubt whether proposed findings made in the expectation of plenary review would be valid, absent reassessment by the recommender, if in fact they received review only under a less rigorous standard. Second, we would also doubt whether this fairly straightforward section 1983 suit would qualify for reference to a special master under the exacting standards of Rule 53(b) (in nonjury matters "a reference shall be made only upon a showing that some exceptional condition requires it" except where a claim requires an accounting or a difficult computation of damages).

Fortunately, the District Judge did not confine his review to the narrow scope appropriate for findings of a special master. Judge Cabranes explicitly determined that upon a *de novo* determination he "would reach the same conclusions as the Magistrate regarding the matters to which there has been objection." This confirmation of the discharge of his responsibilities, as he had originally exercised them under subsection 636(b)(1) when he first adopted the proposed findings, eliminates all question as to the validity of the findings.

3. *Waiver of Jury Trial.* McCarthy contends that he was entitled to a jury trial and never waived this right. The District Judge denied McCarthy a jury on the ground that he had not made a timely demand, pointing out that the initial complaint did not claim a jury and that the second amended complaint, making the demand, added

no new substantive allegations. The Civil Rules require a demand for jury trial on an issue no later than ten days "after the service of the last pleading directed to such issue." Fed.R.Civ.P. 38(b). Failure to make a timely demand constitutes a waiver. *Id.* 38(d). However, "the last pleading directed to" an issue is not the pleading that raises the issue, it is the pleading that contests the issue. Normally, that pleading is an answer, or, with respect to a counterclaim, a reply, *id.* Rule 12(a); *see 5 Moore's Federal Practice* ¶38.39[2], at 38-367 (2d ed. 1988). In this case, no answer was filed to either the original complaint or the first amended complaint. The answer to the second amended complaint was not filed until August 26, 1985, after plaintiff had made a jury demand. There was thus no waiver by reason of a late demand.

Nor, as the defendants contend, relying on *Lovelace v. Dall*, 820 F.2d 223, 227-29 (7th Cir.1987), was there a waiver because McCarthy did not object to proceeding without a jury at the start of the hearing before the Magistrate. *See also Royal American Managers, Inc. v. IRC Holding Corp.*, 885 F.2d 1011, 1018-19 (2d Cir.1989). *Lovelace* deemed the plaintiff to have acceded to a bench trial by not objecting at its start, but the case differs significantly from ours because the issue of entitlement to a jury was never litigated. By contrast, McCarthy's jury claim was challenged by the defendants and adjudicated by the District Court. Once that adverse ruling was made, McCarthy was not required to renew his jury demand at the start of the Magistrate's hearing in 1988.

Nevertheless, the defendants are correct in urging that McCarthy waived entitlement to a jury in the

proceedings before the Magistrate in 1985 when he consented to proceeding under subsection 636(c). At that time, the Magistrate explained to McCarthy in open court that the proceedings would be conducted at the prison as a bench trial without a jury. With that understanding, McCarthy agreed to the subsection 636(c) procedure. This agreement was consent to a non-jury trial under Rule 39(a). The fact that the Magistrate, three years later, permitted McCarthy to renege on his agreement to have the issues tried by the Magistrate under subsection 636(c) and instead made recommended findings subject to de novo review by the District Judge under subsection 636(b)(1) does not undermine the waiver of a jury. McCarthy, though not entitled to any change, succeeded in changing the identity of the judicial officer with final fact-finding responsibility; he did not thereby rescind his consent to have the facts found by a judicial officer.

Nor is the waiver invalid because it occurred prior to the defendants' answer. There is no starting time for jury waivers. They may be agreed to even before a lawsuit arises. *See Rodenbur v. Kaufmann*, 320 F.2d 679, 683-84 (D.C.Cir. 1963). Though a litigant might have a basis for obtaining relief from a jury waiver where a subsequent pleading alters the nature of the issue to be decided from what it appeared to be at the time of the waiver, the defendants' answer here had no such effect.

4. *Free Transcript*. Judge Cabranes denied plaintiff's request for a free transcript of the hearing before the Magistrate, relying on 28 U.S.C. § 753(f) (free transcripts not required where issues frivolous). Though the procedural issues in this case are not frivolous, their resolution does not require examination of the evidence

presented at the hearing before the Magistrate, and it was not error to deny McCarthy a free copy of the transcript of that hearing.

5. *Fact-finding*. McCarthy's challenge to the factfinding is without substance. He contends that prison officers planted a knife in his cell as a pretext to remove him. The Magistrate and the District Judge were entitled to reject this claim.

We have considered McCarthy's remaining contentions and find them without merit. The judgment of the District Court is affirmed.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 6th day of August, one thousand nine hundred and ninety.

Present: Hon. James L. Oakes, Ch. J.,
Hon. Jon O. Newman,
Hon. John M. Walker, Jr.,

JOHN J. McCARTHY,

Plaintiff-Appellant,

v.

GEORGE BRONSON, Warden,
LT. STEVE TOZIER,
Officer PAUL LUSA and
Officer MICKIEWICZ
added 4/12/85,

Defendants-Appellees.

DOCKET NO.
89-2389

A petition for rehearing having been filed herein by Plaintiff-Appellant, John J. McCarthy, pro se.

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition be and it hereby is DENIED.

/s/ Elaine B. Goldsmith
Elaine B. Goldsmith,
Clerk

SUPREME COURT OF THE UNITED STATES

No. 90-5635

John M. McCarthy,

Petitioner

v.

George Bronson, Warden, et al.

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Second Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted limited to the following question: "Whether 28 U.S.C. Section 636(b)(1)(B), which authorizes a district court to refer, without the parties consent, to a magistrate for recommended findings a prisoner petition that challenges 'conditions of confinement' applies to cases challenging a specific episode of allegedly unconstitutional conduct rather than continuing prison conditions."

December 10, 1990

No. 90-5635

In The

Supreme Court of the United States

October Term, 1990

JOHN J. MCCARTHY,

Petitioner,

v.

GEORGE BRONSON, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether 28 U.S.C. § 636(b)(1)(B), which authorizes a district court to refer, without the parties' consent, to a magistrate for recommended findings a prisoner petition that challenges "conditions of confinement," applies to cases challenging a specific episode of allegedly unconstitutional conduct rather than continuing prison conditions.

LIST OF PARTIES

Pursuant to Rule 24.1(b), the parties to the proceeding below were as follows:

The appellant in the Second Circuit was John J. McCarthy; the appellees were Warden George Bronson, Lt. Steve Tozier, Officer Paul Lusa, and Officer Mickiewicz.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 906 F.2d 835, and reprinted at J.A. 59. The magistrate's unpublished Recommended Findings of Fact and Memorandum of Decision is reprinted at J.A. 33. The district court's unreported opinion denying petitioner's motion for postjudgment relief is reprinted at J.A. 52.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Second Circuit were issued on June 22, 1990. On July 17, 1990, McCarthy filed a petition for rehearing, which was denied in an unpublished order on August 6, 1990. J.A. 71. The petition for certiorari was filed on August 21, 1990 and granted on December 10, 1990, along with petitioner's motion to proceed *in forma pauperis*. J.A. 72. This Court has jurisdiction to review the judgment under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Seventh Amendment to the United States Constitution as well as various provisions of the Federal Magistrates Act, 28 U.S.C. § 636 ("the Act"). The Seventh Amendment provides in full, "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise

reexamined in any Court of the United States, than according to the rules of the common law."

28 U.S.C. § 636(b)(1) provides in full:

> Notwithstanding any provision of law to the contrary –
>
> (A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.
>
> (B) a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.
>
> (C) the magistrate shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.

> Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions.

In addition, 28 U.S.C. § 636(c) provides that "[u]pon the consent of the parties" a magistrate "may conduct any and all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case."

STATEMENT

This case arose out of an incident at the Connecticut Correctional Institute at Somers (CCIS) on July 13, 1982. On that date, petitioner, an inmate at the prison,[1] was sprayed with tear gas and forcibly removed from his cell by various CCIS employees. Pursuant to 42 U.S.C. § 1983, McCarthy brought suit against the warden, the commissioner, and four prison guards, alleging that during the July 13 episode the guards had used excessive force in violation of his rights under the Eighth and Fourteenth

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[1] Petitioner has since been transferred from CCIS and currently resides at the federal penitentiary in Leavenworth, Kansas.

Amendments. J.A. 11-24, 33.[2] Over his objection, McCarthy's case was tried before a magistrate, who recommended that judgment be entered in favor of the defendants. J.A. 49. The district court adopted the recommendation and entered judgment. J.A. 50. The Court of Appeals for the Second Circuit affirmed, holding, *inter alia*, that the reference to the magistrate was proper under 28 U.S.C. § 636(b)(1)(B), a provision of the Federal Magistrates Act authorizing a judge to refer "prisoner petitions challenging conditions of confinement" to a magistrate without the consent of the parties. J.A. 65-66.

1. *The Events of July 13, 1982.* At nine o'clock on the morning of July 13, prison authorities informed petitioner that they planned to move him from his cell, an isolation cubicle on death row, to another cell in administrative segregation. J.A. 34. Shortly after lunch, a guard visited McCarthy and asked him whether he was packed. J.A. 35. Believing that the instruction to pack was not a direct order, petitioner refused to gather his materials. *Ibid.* Instead, he indicated that he wanted to know why he was being moved and asked to see a supervisor. *Ibid.*

Having been informed of petitioner's request, the supervisor of the segregation unit decided to carry out the decision to remove petitioner. J.A. 35, 44. At approximately 2:30 p.m., McCarthy learned from other inmates that some guards were forming a group and "rolling." J.A. 36. Panicking, petitioner tied his cell door shut with

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[2] McCarthy also alleged that defendants committed assault and battery in violation of state law. *See* J.A. 33. Several substitutions and changes in the named defendants were made prior to trial. *Ibid.*

clothesline and jammed a piece of plastic spoon into the keyhole. *Ibid.* Shortly thereafter, a group of four guards arrived at his cell. *Ibid.* After unsuccessfully attempting to persuade petitioner to come out, the guards sprayed him with a tear gas "duster." J.A. 37-38. The active ingredient in the tear gas duster, choloracetophenone, is "a lacrimating agent which induces profuse watering of the eyes" and "cause[s] the eyes to burn and sting." J.A. 41, 42. After discharging their chemical weapon, the guards removed petitioner from his cell, handcuffed him, and transported him to the segregation unit. J.A. 38.[3]

2. *The Proceedings in the Trial Court.* On April 11, 1983, McCarthy filed this *pro se* action in the District Court for the District of Connecticut. J.A. 3. The gravamen of petitioner's complaint, which sought both damages and injunctive relief, was that respondents had unlawfully sprayed him with tear gas and otherwise used excessive force when they removed him from his cell during the July 13 episode. J.A. 5, 9, 13-22; *see also* J.A. 28-29, 33.[4] That same day, petitioner's complaint was

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[3] Although petitioner's initial request to shower was denied, eventually he was permitted to do so. J.A. 38-39. He subsequently complained of chemical burns on various parts of his body. J.A. 40.

[4] Petitioner's successive complaints "all . . . consistently set forth the constitutionality of the use of mace [during the July 13, 1982 episode] as *the* issue to be resolved" at trial. J.A. 29 (emphasis added); *see also* J.A. 33. To the extent that petitioner's Second Amended Complaint could be read more broadly to allege additional legal claims, a pretrial ruling effectively narrowed the issues to include only his claim regarding the use of mace. *See* J.A. 25, 28-29. In particular, his claim that he had been improperly denied good-conduct time appears not to have been pursued or adjudicated.

referred to a magistrate for "further pretrial proceedings" under 28 U.S.C. § 636(b)(1). J.A. 2, 61.

On February 28, 1985, the parties signed a standard consent form in which they agreed to have the entire case tried before a magistrate pursuant to 28 U.S.C. § 636(c). J.A. 61; *see also* J.A. 7. A week later, the district court entered an order referring the case "in accordance with" that provision. J.A. 8, 61. On the first day of trial, however, petitioner sought leave to withdraw his consent, and the magistrate permitted him to do so. J.A. 30-32; *see also* J.A. 62. Despite this development, and contrary to the wishes of petitioner, the magistrate proceeded to conduct a bench trial, apparently relying on that portion of 28 U.S.C. § 636(b)(1)(B) that authorizes a magistrate, upon referral by a district judge, "to conduct . . . evidentiary hearings, and to submit to a judge . . . proposed findings of fact and recommendations for the disposition . . . of prisoner petitions challenging conditions of confinement." 28 U.S.C. § 636(b)(1)(B); J.A. 64. On May 23, 1989, the magistrate issued his "Recommended Findings of Fact and Memorandum of Decision," which found in favor of defendants on all of petitioner's claims. J.A. 33, 49.

On June 19, 1989, the district court adopted the magistrate's report and entered judgment for defendants, noting that no objection to the findings or recommendation had been filed within ten days as required by 28 U.S.C. § 636(b)(1) and a local rule of court. J.A. 50-51. On June 22, 1989, however, petitioner filed objections to the magistrate's Recommended Findings of Fact and Memorandum of Decision. J.A. 54. A week later, on June 29,

petitioner filed a motion for relief from judgment, arguing that he had not received the magistrate's report until June 7 and therefore lacked sufficient time to respond before the court entered judgment. *Ibid.*

The district court denied the motion on August 17, 1989. J.A. 54-55. In its ruling, the district court sought to clarify the procedural posture in which the case came to it. Reasoning that "Magistrate Eagan did not issue a decision in this case under 28 U.S.C. § 636(c)" – the section authorizing consensual references – the court dismissed petitioner's attempted appeal pursuant to that section. J.A. 55. The court concluded that the magistrate was instead "essentially acting as a special master pursuant to his powers under 28 U.S.C. § 636(b)(2)," J.A. 53, and that his findings were therefore conclusive unless shown to be " 'clearly erroneous,' " J.A. 54 (quoting Fed. R. Civ. P. 53(e)(2)).[5] "Even upon a *de novo* determination," the court then held, it "would reach the same

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[5] Under 28 U.S.C. § 636(b)(2), a district judge may designate a magistrate to serve as a special master either (1) "pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure," in particular, Fed. R. Civ. P. 53; or (2) "in any civil case, upon consent of the parties, without regard to the provisions of rule 53(b)." Non-consensual reference to a special master under Rule 53 is permitted only in certain, limited circumstances. See Fed. R. Civ. P. 53(b) ("A reference to a master shall be the exception and not the rule."). Rule 53(b) draws a sharp distinction between jury and nonjury actions, permitting references in jury actions "only when the issues are complicated" and in nonjury actions – with the exception of "matters of account and of difficult computation of damages" – "only upon a showing that some exceptional condition requires it." In nonjury matters, the special master's "findings of fact"

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conclusions as the Magistrate regarding the matters to which there has been objection." J.A. 55.

3. *The Court of Appeals Decision*. The United States Court of Appeals for the Second Circuit affirmed. J.A. 59. At the outset, the court acknowledged that the case was "complicated by some uncertainty as to the authority of the Magistrate in recommending proposed findings to the District Judge and the authority of the District Judge in approving those recommended findings." *Ibid.* After reviewing the "tangled sequence of events" giving rise to this uncertainty, J.A. 63, the court turned to the issue of the magistrate's authority to conduct the trial.

The court began by holding that the reference to the magistrate could not be sustained under § 636(b)(2), the provision that authorizes magistrates to serve as special masters.[6] Thus, the reference could be upheld only if proper under § 636(c), which authorizes consensual references, or § 636(b)(1)(B), which authorizes non-consensual

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are accepted by the district judge "unless clearly erroneous." Fed. R. Civ. P. 53(e)(2). In matters tried before a jury, however, the special master "shall not be directed to report the evidence" but rather his "findings upon the issues submitted to [him] are admissible as evidence of the matters found and may be read to the jury." Fed. R. Civ. P. 53(e)(3); *see also* 9 C. Wright & A. Miller, *Federal Practice and Procedure: Civil* § 2604, at 783 (1971 & Supp. 1990) ("[T]he report of the master is merely evidence, which the jury is free to disregard . . . . ").

[6] The court noted that "this fairly straightforward section 1983 suit" likely would not "qualify for reference to a special master under the exacting standards of Rule 53(b)." J.A. 67. *See supra* note 5.

references of "prisoner petitions challenging conditions of confinement." With respect to the former, the court observed that the magistrate "could have proceeded" under the original consent form, but "elected not to do so, preferring instead to permit McCarthy to withdraw consent to the 636(c) reference." J.A. 64. It acknowledged that "[a]rguably, vacating the 636(c) reference left the Magistrate with only the pretrial assignment he had originally been given" under § 636(b)(1). The court nonetheless concluded that the magistrate was not "required to take such a narrow view of his authority" but could instead construe the earlier reference of pretrial matters as empowering him to conduct the trial under the prisoner-petition clause of § 636(b)(1)(B). J.A. 64-65.

The court of appeals then turned to the "more substantial question . . . whether McCarthy's lawsuit is a petition 'challenging the [sic] conditions of confinement' within the meaning of subsection 636(b)(1)(B)." J.A. 65. The court first explained that this phrase had originated in a 1976 amendment to the Federal Magistrates Act, *see* Pub. L. No. 94-577, 90 Stat. 2729 (1976), but observed that the House Report accompanying the bill "does not explain the [prisoner-petition] category." J.A. 65. The court rejected the view, adopted by several circuits, that the phrase "conditions of confinement" includes "only challenges to pervasive prison conditions and [not] claims concerning specific episodes of misconduct by prison officials." *Ibid.* (rejecting *Houghton v. Osborne*, 834 F.2d 745 (9th Cir. 1987) and *Hill v. Jenkins*, 603 F.2d 1256, 1259-60 (7th Cir. 1979) (Swygert, J., concurring)). Instead, the Second Circuit aligned itself with those decisions that "have construed the phrase ['conditions of confinement']

broadly to include almost any complaint made by a prisoner against prison officials." *Ibid.* (citing *Branch v. Martin*, 886 F.2d 1043, 1045 n.1 (8th Cir. 1989)). Believing that the prisoner-petition clause covered virtually all prisoner litigation brought under 42 U.S.C. § 1983, the court of appeals concluded that it encompassed claims founded on a single episode of unconstitutional conduct. Accordingly, the court held, the magistrate was authorized to conduct petitioner's trial notwithstanding his lack of consent. J.A. 65.[7]

Petitioner filed a petition for rehearing on July 17, 1990, which was denied on August 6, 1990. J.A. 71. This Court granted certiorari on December 10, 1990. J.A. 72.

SUMMARY OF ARGUMENT

Petitioner's complaint – which alleged a single episode of unconstitutional conduct directed exclusively at him – does not constitute a "petition[] challenging conditions of confinement" within the meaning of 28 U.S.C. § 636(b)(1)(B). Accordingly, it was error to refer the case, without his consent, for trial before a federal magistrate.

1. As most courts of appeals have concluded, the phrase "conditions of confinement" refers to ongoing

[7] The court of appeals also upheld the denial of petitioner's demand for a jury trial, request for free transcripts, and his miscellaneous challenges to the magistrate's findings of fact. J.A. 67-70. With respect to the jury trial issue, the court reasoned that petitioner's initial consent to the reference had operated as a waiver. These issues are not before this Court.

practices or circumstances generally affecting at least a segment of the prison population as a whole. *See, e.g., Clark v. Poulton*, 914 F.2d 1426, 1430 (10th Cir. 1990). Construing the statute in that manner is in keeping with common usage, as well as with this Court's consistent understanding of the term. *See, e.g., Whitley v. Albers*, 475 U.S. 312, 319 (1986) (differentiating between cases challenging "conditions of confinement" and those alleging a single incident of excessive force). Moreover, precisely the same understanding is apparent from Congress's use of identical language in other statutory contexts. *See, e.g.*, 18 U.S.C. § 4013 (a)(4). Consistent with the "ordinary-. . . meaning" of the phrase, *Perrin v. United States*, 444 U.S. 37, 42 (1979), and the longstanding understanding of courts and Congress alike, a complaint alleging a single, isolated incident of unconstitutionally excessive force simply cannot be viewed as a "petition[] challenging conditions of confinement."

2. Both the structure of the Magistrates Act and the constitutional backdrop against which it was enacted confirm that § 636(b)(1)(B) does not authorize non-consensual reference of complaints predicated on a single episode of unconstitutional conduct. Because injunctive relief is rarely appropriate in such cases, *City of Los Angeles v. Lyons*, 461 U.S. 95, 111-12 (1983), claims of this nature almost invariably seek damages as the principal or exclusive form of relief. Accordingly, under settled principles, the Seventh Amendment entitles litigants who bring such actions to trial by jury. As the history and text of the statute make clear, however, Congress did not empower magistrates to conduct jury trials in *any* case referred without the parties' consent – including those

referred pursuant to § 636(b)(1)(B). Congress – which is presumptively aware of the constitutional background against which it acts – could not have authorized the wholesale, non-consensual assignment of a class of cases, for which the parties are entitled to trial by jury, to a magistrate who lacks the power even to empanel a jury, much less conduct a full trial before one. *See Gomez v. United States*, 109 S. Ct. 2237, 2246-47 (1989).

3. Even were it appropriate to look beyond the text and structure of the Act, the legislative history of § 636(b)(1)(B) provides no basis for the construction adopted by the court of appeals. While largely silent on the meaning of the phrase "conditions of confinement," the history of the provision does demonstrate that Congress was seeking to strike a balance between two objectives: relieving district courts of some of their most time-consuming burdens while remaining "alert" to constitutional limitations on the delegation of judicial power to non-Article III officers. *United States v. Raddatz*, 447 U.S. 667, 681-84 (1980). To satisfy the latter concern, Congress provided that any decision made by a magistrate pursuant to a non-consensual reference would be subject to *de novo* reconsideration by the district court – a standard of review inherently inconsistent with trial by jury. Interpreting § 636(b)(1)(B) as limited to purely injunctive actions alleging ongoing, pervasive circumstances or practices fulfills both of Congress's objectives: it delegates a large category of extremely onerous litigation to magistrates, while recognizing the care Congress took to assure that any such delegation conform to the Constitution.

ARGUMENT

The question presented in this case is whether a prisoner complaint alleging a single unconstitutional episode of excessive force qualifies as a "petition[] challenging conditions of confinement" within the meaning of 28 U.S.C. § 636(b)(1)(B) and is thereby subject to reference, without the parties' consent, to a federal magistrate. That question must be answered in the negative. The interpretation advanced by respondents is inconsistent with both the language and structure of the Act, which convey a clear intent to limit such references to injunctive actions challenging persistent, ongoing practices or conditions. Moreover, reading the Act to allow non-consensual reference of all prisoner complaints – including those for which the plaintiff is unquestionably entitled to a jury trial – ignores the limitations imposed by the Seventh Amendment. Congress's intent must be understood against the backdrop of that constitutional directive, which is plainly inconsistent with non-consensual reference of simple damages actions premised on a single episode of excessive force.

I. THE PHRASE "PRISONER PETITIONS CHALLENGING CONDITIONS OF CONFINEMENT" CANNOT FAIRLY BE READ TO INCLUDE SIMPLE DAMAGES ACTIONS ALLEGING A SINGLE INCIDENT OF EXCESSIVE FORCE.

By far the most natural reading of the Act is to construe the phrase "prisoner petitions challenging conditions of confinement" as limited to complaints concerning ongoing practices or circumstances (often embodied

in a regulation) that affect prisoners, or a class of prisoners, generally and, if proven, are subject to redress by appropriate injunctive relief. That interpretation, which has been endorsed by the clear majority of the courts of appeals, conforms with the common usage of the phrase "conditions of confinement," this Court's consistent understanding of its meaning, and Congress's use of identical language in related contexts.

Statutory language must be read according to its "ordinary, contemporary, common meaning." *Perrin v. United States*, 444 U.S. 37, 42 (1979). Pursuant to its common usage, the word "condition" "connotes an ongoing situation as opposed to an isolated incident." *Clark v. Poulton*, 914 F.2d 1426, 1430 (10th Cir. 1990). General as well as legal dictionaries attest to this linguistic fact.[8] And most federal courts interpreting § 636(b)(1)(B) have similarly concluded that a "condition" is a circumstance that is recurrent or lasting rather than ephemeral or transitory.[9] Such circumstances can range from generalized

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[8] For example, *Webster's Third New International Dictionary* (1968) defines a "condition" as an "existing state of affairs," or "a mode or state of being." *Id.* at 473; *see also Black's Law Dictionary* 293 (6th ed. 1990) (defining "condition" as a "[m]ode or state of being," a "state or situation").

[9] Contrary to the suggestion of the decision below, most of the courts of appeals faced with the question have concluded that a complaint alleging an isolated incident of unconstitutional conduct does not constitute a petition "challenging conditions of confinement." 28 U.S.C. § 636(b)(1)(B). *See Clark v. Poulton*, 914 F.2d at 1429; *Houghton v. Osborne*, 834 F.2d 745, 749-50 (9th Cir. 1987); *Wimmer v. Cook*, 774 F.2d 68, 74 n.9 (4th Cir. 1985); *Orpiano v. Johnson*, 687 F.2d 44, 46-47 (4th Cir. 1982);

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aspects of the physical environment, *e.g.*, double bunking, to policies pertaining to access to the prison library. But it strains the "ordinary . . . meaning" of the phrase beyond the breaking point to suggest that a guard, by virtue of beating a prisoner on one occasion, creates a "condition of confinement."

The distinction between a "condition of confinement" and an isolated incident of unconstitutional conduct is well recognized in this Court's cases. Consistent with common usage, the Court has employed the term – which in many respects has achieved the status of a legal term of art – to describe ongoing, pervasive circumstances generally affecting prison life. *See, e.g., Hutto v. Finney*, 437 U.S. 678 (1978) (challenging cell size, sleeping arrangements, food, working conditions and widespread incidence of prisoner-on-prisoner violence); *Rhodes v. Chapman*, 452 U.S. 337 (1981) (challenging overcrowding); *Bell v. Wolfish*, 441 U.S. 520 (1979) (challenging a "potpourri" of generalized policies, including those limiting prisoner access to publications, authorizing random "shake-downs," and mandating body-cavity searches after visits); *Procunier v. Martinez*, 416 U.S. 396 (1974) (challenging, *inter alia*, regulations limiting prisoners' access to mail). Because such cases, unlike those challenging a single episode of excessive force, involve ongoing

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see also Hill v. Jenkins, 603 F.2d 1256, 1259-60 (7th Cir. 1979) (Swygert, J., concurring). Indeed, apart from the decision under review, only the Eighth Circuit has reached a contrary conclusion. *Branch v. Martin*, 886 F.2d 1043, 1045 n.1 (8th Cir. 1989).

practices that are likely to recur, the plaintiffs generally have sought (and, where appropriate, obtained) injunctive relief rather than damages.[10]

Of particular significance is the decision in *Whitley v. Albers*, 475 U.S. 312 (1986). *Whitley* was a damages action brought by a prisoner who alleged that guards had shot him unnecessarily while trying to quell a disturbance. In setting out the appropriate standard of review, the Court carefully distinguished between Eighth Amendment claims that (1) challenge "conditions of confinement"; (2) allege a failure to address the medical needs of a particular prisoner, *see Estelle v. Gamble*, 429 U.S. 97 (1976); and (3) allege that prison authorities used excessive force to restore order. 475 U.S. at 319.[11] *Whitley* thus confirms the

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[10] Unlike damages, which are available for any constitutional injury regardless of how transitory or isolated it may be, injunctive relief is available only where a party demonstrates that the wrong is likely to recur. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 111-12 (1983) (injunctive relief not available "absent a sufficient likelihood that [the plaintiff] will be wronged in a similar way").

[11] Noting that cases in the last category presented special concerns, the Court held that a prisoner bringing such a claim must demonstrate that force was applied " 'maliciously and sadistically for the very purpose of causing harm.' " 475 U.S. at 320-21 (quoting *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir.), *cert. denied*, 414 U.S. 1033 (1973)). With the single exception of *Wilson v. Seiter*, 893 F.2d 861 (6th Cir.), *cert. granted*, 111 S. Ct. 41 (1990), the courts of appeals have understood the *Whitley* standard to be inapplicable to cases challenging conditions of confinement and, correspondingly, have had no difficulty distinguishing conditions cases from cases involving excessive-force claims. *See, e.g., Gillespie v. Crawford*, 833 F.2d 47, 50 (5th Cir. 1987) (per curiam), *modified in other respects*, 858 F.2d 1101 (5th Cir. 1988) (en banc) (per curiam).

distinction evident throughout the Court's prisoner-rights cases: a claim challenging conditions of confinement is different from one alleging a single isolated incident of unconstitutional conduct.

Finally, precisely the same understanding is apparent from Congress's use of the phrase "conditions of confinement" in other statutory contexts. *See, e.g.*, 18 U.S.C. § 4013 (a)(4) (authorizing Attorney General to enter into contracts "to establish acceptable conditions of confinement" in state facilities housing federal detainees); 42 U.S.C. §§ 1997a(a), 1997c(a)(1) (authorizing Attorney General to initiate injunctive actions challenging "egregious or flagrant conditions" in state prisons); 42 U.S.C. §§ 3769, 3769b(a)(1) (requiring state governments to develop a "plan for . . . improving conditions of confinement" as a precondition to receiving federal funds "to relieve overcrowding and substandard conditions"). In each instance, as the context of these provisions makes plain, Congress intended the phrase to refer to the physical environment of, or the pervasive, ongoing circumstances within, a jail or prison.[12]

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[12] Numerous state statutes likewise employ the term "conditions of confinement" to mean ongoing and pervasive circumstances. *See, e.g.*, Ark. Stat. Ann. § 12-26-107 (1987 & Supp. 1989); Neb. Rev. Stat. § 83-4,131 (1987) (requiring personnel of state commission to "visit and inspect each criminal detention facility in the state for the purpose of determining the conditions of confinement, the treatment of prisoners, and whether such facilities comply with the minimum standards established by the board."); N.C. Gen. Stat. § 153A-222 (1990); W. Va. Code § 31-20-5 (1988 & Supp. 1990). Moreover, several state statutes

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In sum, the term "condition of confinement" – according to its ordinary meaning and as employed in prior decisions of this Court as well as in other federal statutes – refers to ongoing practices or circumstances generally affecting at least a segment of the prison population as a whole. To be sure, the distinction between a "condition of confinement" and an isolated instance of unconstitutional conduct, like most legal distinctions, may well blur at the edges. In practice, however, the lower federal courts have had little difficulty differentiating between the two categories – both in the context of interpreting § 636(b)(1)(B) and elsewhere, *see supra* note 11. This case is illustrative, for the line is easily drawn here. A case in which the only issue was whether guards violated the Constitution when, on one occasion, they sprayed a single prisoner with mace cannot be sensibly viewed as a petition challenging "conditions of confinement."

II. THE STRUCTURE AND PURPOSE OF THE ACT CONFIRM THAT CONGRESS DID NOT INTEND TO AUTHORIZE NON-CONSENSUAL REFERENCE OF DAMAGES ACTIONS IN DEROGATION OF THE SEVENTH AMENDMENT RIGHT TO TRIAL BY JURY.

Both the structure of the Federal Magistrates Act and the constitutional backdrop against which it was enacted

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or rules of court explicitly distinguish between "conditions of confinement" and the "conduct of correctional officials." Cal. Rules of Court App. 1, § 6.5 (Deering 1990). *See also* La. Rev. Stat. Ann. § 15:1171(B) (West Supp. 1990) (distinguishing actions "pertaining to conditions of confinement" from those pertaining to "personal injuries, medical malpractice, time computations . . . or challenges to rules, regulations, policies, or statutes").

confirm that § 636(b)(1)(B) does not authorize non-consensual reference of damages actions, as those premised on a single episode of unconstitutional conduct almost invariably are. Under settled principles, the Seventh Amendment entitles prisoners who bring such actions to trial by jury. Because Congress must be presumed not to have legislated in derogation of this basic right, the court of appeals' position could only be correct if a magistrate, having been referred a case pursuant to § 636(b)(1)(B), were authorized to conduct a jury trial. As both the history and text of the Act make clear, however, Congress did not empower magistrates to conduct jury trials in *any* case referred without the parties' consent – and, indeed, might well have been constitutionally prohibited from doing so. In light of these related considerations – the right to a jury trial in this class of cases and the absence of a mechanism for vindicating that right in suits referred under § 636(b)(1)(B) – Congress plainly intended to confine such referrals to purely injunctive actions broadly challenging ongoing, pervasive conditions of confinement.

1. Prisoner complaints predicated on a single episode of unconstitutional conduct almost invariably are brought under 42 U.S.C. § 1983 and seek damages as the principal or exclusive form of relief.[13] As with damages

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[13] *See, e.g., Albers v. Whitley*, 743 F.2d 1372, 1373 (9th Cir. 1984), *rev'd*, 475 U.S. 312 (1986); *Sheffey v. Greer*, 391 F. Supp. 1044 (E.D. Ill. 1975). See *also Cowans v. Wyrick*, 862 F.2d 697 (8th Cir. 1988); *King v. Blankenship*, 636 F.2d 70 (4th Cir. 1980); *Johnson v. Glick*, 481 F.2d 1028 (2d Cir.), *cert. denied*, 414 U.S. 1033 (1973). While, as this case demonstrates, prisoners bringing such suits sometimes also request injunctive relief, they are

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claims brought under other federal civil rights statutes, the Seventh Amendment endows the parties involved in such suits with the right to trial by jury. *See Curtis v. Loether*, 415 U.S. 189, 192-98 (1974) (Title VIII); *Lytle v. Household Mfg., Inc.*, 110 S. Ct. 1331, 1335 (1990) (42 U.S.C. § 1981). Section 1983 "creates a species of tort liability" and entitles prevailing plaintiffs to legal remedies "determined according to principles derived from the common law of torts." *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 305-06 (1986) (citations and internal quotations omitted). Under the Court's established Seventh Amendment jurisprudence, *see Granfinanciera, S.A. v. Nordberg*, 109 S. Ct. 2782, 2790 (1989), the jury-trial right unquestionably attaches in such actions.[14]

2. It is equally plain that Congress did not authorize magistrates to conduct a jury trial in cases referred pursuant to § 636(b)(1)(B). That conclusion is evident on the face of the statute, is confirmed by the legislative history,

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usually not entitled to it. Unless the prisoner can demonstrate that the unconstitutional conduct is likely to reoccur – a difficult showing when the prisoner is alleging only a single episode of excessive force – equitable relief is not available. *City of Los Angeles v. Lyons*, 461 U.S. at 111-12.

[14] Although, to our knowledge, this Court has never addressed the issue directly, the lower federal courts have never doubted that § 1983 damages claimants are entitled to trial by jury. *See, e.g., Segarra v. McDade*, 706 F.2d 1301, 1304 & n.6 (4th Cir. 1983); *Dolence v. Flynn*, 628 F.2d 1280, 1282 (10th Cir. 1980). *See also Carlson v. Green*, 446 U.S. 14, 22 (1980) (*Bivens* action for money damages based on deliberate indifference to the serious medical needs of a federal prisoner carries with it the right to trial by jury).

and has received universal approval in the lower federal courts.[15]

Section 636(b)(1)(B) – which authorizes magistrates to conduct "hearings," not trials – was enacted in 1976. Responding to this Court's decision in *Wingo v. Wedding*, 418 U.S. 461 (1974), which had construed the 1968 Act to prohibit magistrates from conducting habeas hearings, Congress sought both to clarify and expand magistrates' authority in two related ways. First, it authorized non-consensual referral of certain pretrial motions, *e.g.*, motions to dismiss or for summary judgment. Second, it empowered magistrates to hear "applications for posttrial relief made by individuals convicted of criminal offenses and . . . prisoner petitions challenging conditions of confinement." With respect to all of the matters referenced in § 636(b)(1)(B), the magistrate was directed to submit to the district court "proposed findings of fact" as well as a recommended "disposition" of the issue. To the extent a party makes timely objections to such findings or recommendations, the district judge "shall make a de novo determination" of the matter and, in all events, retains the power to "accept, reject or modify" the magistrate's report "in whole or in part."

Both the language and structure of § 636(b)(1)(B) make clear that it does not authorize magistrates to conduct jury trials. To begin with, the section contains no reference to juries, much less a specific authorization. As the Court has held in construing a related provision of

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[15] *See, e.g., Hall v. Sharpe*, 812 F.2d 644, 647-49 (11th Cir. 1987); *Archie v. Christian*, 808 F.2d 1132, 1135-37 (5th Cir 1987) (en banc); *Wimmer v. Cook*, 774 F.2d 68, 73-74 (4th Cir 1985).

the Act, Congress's "fail[ure] even to mention th[e] matter in the statute" is itself a strong indication that jury trials were not within its contemplation. *Gomez v. United States*, 109 S. Ct. 2237, 2246-47 (1989).[16] Moreover, findings of fact generated pursuant to a § 636(b)(1)(B) reference are subject to "de novo determination" by the district court. While that standard of review is probably necessary to satisfy Article III concerns, *see United States v. Raddatz*, 447 U.S. 667, 681-84 (1980), it is inherently incompatible with trial by jury: Reviewing a jury verdict under a *de novo* standard would either effectively deny the right to trial by jury or impermissibly abrogate the district court's assigned, and perhaps constitutionally compelled, role as the ultimate factfinder.[17] For similar reasons, *de novo* review of a jury verdict makes no practical sense. Even for the more limited task of having magistrates empanel juries, this Court has expressed "serious

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[16] It is also noteworthy in this regard that all of the other items enumerated in § 636(b)(1)(B) are non-jury matters, such as applications for preliminary injunctive relief and motions to dismiss. In addition, as several courts have noted, the phrase "prisoner petitions challenging conditions of confinement" is itself inconsistent with an intent to authorize magistrates to conduct jury trials. *See, e.g., Ford v. Estelle*, 740 F.2d 374, 378 (5th Cir. 1984) (use of word "petition" indicates "Congress' . . . intention to allow reference only of nonjury matters" under § 636(b)(1)(B)); *see also Black's Law Dictionary* 1031 (5th ed. 1979) (defining "petitioner," among other things, as "[t]he one who starts an equity proceeding or the one who takes an appeal from a judgment.").

[17] *See also Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 358-59 (1962) (Reexamination Clause of Seventh Amendment bars redetermination by court of facts found by a jury).

doubts that a district judge could review [that] function meaningfully" under the *de novo* standard of § 636(b)(1)(B). *Gomez v. United States*, 109 S. Ct. at 2247.

Finally, while the text and structure of § 636(b)(1)(B) are independently conclusive, subsequent amendments to the Act confirm that magistrates are not authorized to conduct jury trials in cases referred under that provision. In 1979, Congress amended the Act by adding a new section expressly empowering magistrates to conduct "any or all proceedings in a jury or nonjury civil matter" provided appropriate consent is obtained from the parties. 28 U.S.C. § 636(c)(1). *See also* 18 U.S.C. § 3401(b) (also added in 1979). The legislative history of those amendments reveals a clear understanding on the part of Congress that magistrates were not authorized to conduct jury trials under *any* section of the pre-1979 Act.[18] *See Gomez v. United States*, 109 S. Ct. at 2244.

3. The language and structure of § 636(b)(1)(B), together with the constitutional concerns they reflect, are fundamentally incompatible with the interpretation adopted by the court of appeals and advanced by respondents here. It defies common sense to believe that Congress – which is presumptively aware of the constitutional backdrop against which it acts – authorized

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[18] S. Rep. No. 74, 96th Cong., 1st Sess. 4-5, *reprinted* in 1979 U.S. CODE CONG. & ADMIN. NEWS 1469, 1472-73; H.R. Rep. No. 287, 96th Cong., 1st Sess. 1, 8-11 (1979); *see also Hall v. Sharpe*, 812 F.2d 644, 646-47 (11th Cir. 1987); *In re Wickline*, 796 F.2d 1055, 1058 n.6 (8th Cir. 1986); *Ford v. Estelle*, 740 F.2d 374, 380 (5th Cir. 1984).

the wholesale, non-consensual assignment of a class of cases, for which the parties are entitled to trial by jury, to a magistrate who lacks the power even to empanel a jury, much less to conduct a full trial before one. *See DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 108 S. Ct. 1392, 1397 (1988) (because Congress "swears an oath to uphold the Constitution," the Court will "not lightly assume that Congress intended to infringe constitutionally protected liberties"). That conclusion is further reinforced by the fact that all of the other items enumerated in § 636(b)(1)(B) clearly pertain to nonjury matters, *e.g.*, habeas petitions and motions for preliminary injunctive relief. Given this textual context, the clarity of the Seventh Amendment right, and the absence of a mechanism for vindicating that right under the statute, it would be highly anomalous to assume that Congress intended to authorize non-consensual referral of simple damages cases such as petitioner's.[19]

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[19] In this regard it is of no consequence that a party may always waive the right to trial by jury, as petitioner was found to have done here. The issue in this case is not whether the statute is unconstitutional as applied, but how best to interpret Congress's intent. In our view, it is non-sensical to believe that Congress would have authorized the non-consensual reference of a whole class of cases to which the Seventh Amendment right so clearly attaches without making some explicit provision to assure that the right could be vindicated – *e.g.*, by authorizing magistrates to conduct jury trials or by providing that such cases shall be subject to non-consensual reference "unless a party demands a jury." Congress, of course, did neither.

In light of these considerations, by far the more coherent interpretation is to construe the phrase "prisoner petitions challenging conditions of confinement" as referring to purely injunctive actions alleging ongoing, pervasive circumstances or practices. That construction conforms to the "settled policy" of avoiding interpretations that "engender[] constitutional issues," reflects the most natural reading of the language, *see supra* pp. 13-18, and fits most comfortably into the overall framework of both the statute as a whole and § 636(b)(1)(B) in particular. *Gomez v. United States*, 109 S. Ct. at 2241.

4. Moreover, this interpretation is consistent with Congress's avowed objective of relieving the district courts of many of their most time-consuming burdens while being "alert" to the constitutional limits on the exercise of judicial power by non-Article III officers. *United States v. Raddatz*, 447 U.S. at 681-84.[20] On the one hand, Congress had doubts about whether any non-consensual reference would be constitutionally permissible unless the district court retained its authority as the ultimate fact-finder – a status inherently inconsistent with allowing magistrates to oversee jury trials.[21] Accordingly,

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[20] *See also* S. Rep. No. 625, 94th Cong., 2d Sess. 5-6 (1976); H.R. Rep. No. 1609, 94th Cong., 2d Sess. 8, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 6162, 6167-68.

[21] *See, e.g.*, S. Rep. No. 625, 94th Cong., 2d Sess. 6 (1976); H.R. Rep. No. 1609, 94th Cong., 2d Sess. 8, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 6162, 6168. The legislative reports of both chambers cite a Seventh Circuit decision that extensively reviewed the history of the Federal Magistrates Act and observed that Congress's Article III concerns

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it clearly did not contemplate non-consensual reference of matters that would require trial by jury. On the other hand, when it enacted the § 636(b)(1)(B) in 1976, it was surely aware of a new and burgeoning category of prison reform cases, typically brought as class actions, in which inmates sought broad injunctive relief to improve the conditions of their confinement. *See, e.g., Pugh v. Locke,* 406 F. Supp. 318, 328 (M.D. Ala. 1976) ("Federal litigation by prisoners alleging systemic constitutional deficiencies has mushroomed in recent years."), *aff'd as modified,* 559 F.2d 283 (5th Cir. 1977), *rev'd in part on other grounds,* 438 U.S. 781 (1978) (per curiam).[22] Interpreting § 636(b)(1)(B)

(Continued from previous page)

were "to a certain extent, tied to the constitutional guarantee to a trial by jury." *TPO, Inc. v. McMillen,* 460 F.2d 348, 354 n.37 (7th Cir. 1972). *See* S. Rep. No. 625, 94th Cong., 2d Sess. 3-4, 9 (1976); H.R. Rep. No. 1609, 94th Cong., 2d Sess. 5-6, 11, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 6162, 6165-66, 6171.

[22] *See generally Rhodes v. Chapman,* 452 U.S. at 353-63 (Brennan, J., concurring) (chronicling the development of this type of lawsuit). Prototypical examples of such cases litigated at or near the time Congress enacted § 636(b)(1)(B) include: *Holt v. Sarver,* 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd,* 442 F.2d 304 (8th Cir. 1971); *Newman v. Alabama,* 349 F. Supp. 278 (M.D. Ala. 1972), *aff'd in part,* 503 F.2d 1320 (5th Cir. 1974), *cert. denied,* 421 U.S. 948 (1975); *Gates v. Collier,* 349 F. Supp. 881 (N.D. Miss. 1972), *aff'd,* 501 F.2d 1291 (5th Cir. 1974); *Inmates of Suffolk County Jail v. Eisenstadt,* 360 F. Supp. 676 (D. Mass. 1973), *aff'd,* 494 F.2d 1196 (1st Cir. 1974); *Diamond v. Thompson,* 364 F. Supp. 659 (M.D. Ala. 1973); *McCray v. Sullivan,* 399 F. Supp. 271 (S.D. Ala. 1975). Academic commentators had also recognized such litigation as a new and distinct legal phenomenon. *See, e.g.,* Comment, *The Role of the Eighth Amendment in Prison Reform,* 38

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in the manner we suggest fulfills both of Congress's objectives: it delegates a large category of extremely time-consuming litigation to magistrates, while recognizing the care Congress took to assure that any such delegation conform to the Constitution.[23]

Not surprisingly in light of these objectives, the legislative history is fully consistent with the conclusion that

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U. Chi. L. Rev. 647, 651, 655-63 (1971); *see generally* P. Low and J. Jeffries, *Civil Rights Actions: Section 1983 and Related Statutes* 679-81 (1988). In such cases, magistrates perform a great variety of functions, resulting in a significant savings of judicial resources. *See* Note, *"Mastering" Intervention in Prisons,* 88 Yale L.J. 1062, 1068-72 (1979).

[23] It is, of course, always possible for prisoners to include a damages claim even in a broad-based conditions suit, although that approach appears to be very much the exception to the rule – both because of the difficulty of certifying a class in a damages action premised on systemic allegations and the likelihood that prison officials in such suits will be immune from damages as a matter of law. *See Cleavinger v. Saxner,* 474 U.S. 193 (1985). Even when a damages claim is included, however, the magistrate may still relieve the district court of much of the burden of the litigation. For example, a magistrate can handle a variety of pretrial matters under the authority of § 636(b)(1)(A), and under § 636(b)(1)(B) may hold hearings and make recommendations pertaining to motions for summary judgment or to dismiss, including those contending that the damages portion of the claim should be dismissed on immunity grounds. In addition, the court can sever the damages claim and refer the equitable claims to the magistrate to be resolved first. While, as a formal matter, any findings of fact stemming from the initial hearing will not have collateral estoppel effect in a subsequent damages action, there will be many cases that will either settle or not be pursued after disposition of the equitable claims.

"prisoner petitions challenging conditions of confinement" refers to injunctive suits alleging ongoing, pervasive practices or circumstances. Because the principal focus of the 1976 amendments was to authorize magistrates to hold habeas hearings (in response to *Wingo v. Wedding*), specific references to the prisoner-petition clause are exceedingly sparse and largely unhelpful. Nonetheless, relying on several allusions to 42 U.S.C. § 1983 in the House Report, the court of appeals apparently believed that the prisoner-petition clause was intended to cover *all* prisoner litigation brought under that section. *See* J.A. 65-66. In point of fact, excerpts from elsewhere in the Reports suggest precisely the opposite conclusion.[24] Moreover, the court of appeals' view simply makes no sense. Reading the prisoner-petition clause as coextensive with § 1983 is both over-inclusive – in that it would include damages actions and suits premised on pre-conviction conduct – and underinclusive, in that it would exclude actions brought by federal prisoners or against private parties, *e.g.*, the contractor who built the

[24] *See, e.g.*, S. Rep. No. 625, 94th Cong., 2d Sess. 2 (1976) (Act "grants to the magistrates the power . . . to hear and recommend a dispostion of certain dispositive motions, including . . . *certain prisoner petitions*") (emphasis added). Self-evidently, the underscored language is inconsistent with an intent to include *all* prisoner litigation within its ambit. *See also* H.R. Rep. No. 1609, 94th Cong., 2d Sess. 11, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 6162, 6171 ("petitions under section 1983 of title 42 United States Code brought by prisoners' [sic] *challenging the conditions of their confinement*") (emphasis added); *see also* S. Rep. No. 625, 94th Cong., 2d Sess. 9 (1976) (same). Unless the highlighted language is read to limit or restrict what precedes it, it is redundant.

facility. As reference to the text, history, and underlying purposes make clear, Congress did not paint with so coarse a brush.

In sum, the prisoner-petition clause of § 636(b)(1)(B) does not encompass damages actions premised on an isolated episode of unconstitutional conduct. That conclusion requires reversal here. The only issue joined at trial in this case was whether respondents violated petitioner's constitutional rights when, on a single occasion, they forcibly removed him from his cell and "sprayed him with 'Big Red,' a chemical weapon similar to mace." J.A. 25. Because that complaint, which sought both compensatory and punitive damages, does not constitute a "prisoner petition[ ] challenging conditions of confinement," the court of appeals erred in holding that it was subject to non-consensual referral under § 636(b)(1)(B).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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In The

Supreme Court Of The United States

OCTOBER TERM, 1990

JOHN J. McCARTHY,
Petitioner,

v.

GEORGE BRONSON, WARDEN, ET AL.,
Respondents.

On Writ Of Certiorari To The United States
Court Of Appeals For The Second Circuit

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

Whether 28 U.S.C. § 636(b)(1)(B), which authorizes a district court to refer, without the parties' consent, to a magistrate for recommended findings a prisoner petition that challenges "conditions of confinement," applies to cases challenging a specific episode of allegedly unconstitutional conduct rather than continuing prison conditions.

PARTIES TO THE PROCEEDINGS

The petitioner named in the caption, John J. McCarthy, was the plaintiff in the district court and the appellant in the Court of Appeals below. In addition to the respondent named in the caption, George Bronson, Warden, additional respondents are Steven A. Tozier, Fred Mickiewicz and Paul Lusa. These respondents were defendants in the district court and appellees in the Court of Appeals below.

Additional respondents, who are defendants pursuant to Rule 25(d)(1) of the Federal Rules of Civil Procedure, are the current Commissioner of the Connecticut Department of Correction, Larry Meachum, and the current Warden of the Connecticut Correctional Institution at Somers, Lawrence Tilghman.

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On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF FOR RESPONDENTS

STATUTORY PROVISIONS

The relevant statutory provisions, 28 U.S.C. §§ 636(b) and (c)(1), are set forth in full as an appendix to this brief. (App., *infra*, 1A). Seventh Amendment rights are not at issue in this case.[1]

[1] The Court of Appeals held that the signed consent form of February 28, 1985 constituted a valid waiver to a jury trial. J.A. 59, at 67 69; 906 F.2d 835, at 841. The waiver is not part of the question on which the Court granted certiorari, and the petitioner concedes the jury issue is not before the Court. Pet. Br. at 10, n.7. To the extent petitioner contends that the Seventh Amendment is related to the question certified, the respondents' arguments may be found *infra* at 8, 18-22.

STATEMENT

This prisoner civil rights action, brought pursuant to 42 U.S.C. § 1983, alleged excessive force by state correctional officers in violation of the Eighth and Fourteenth Amendments. J.A. 21-22. Specifically, John J. McCarthy,[2] the petitioner, alleged that the Connecticut Correctional Institution at Somers ("CCIS") lacked adequate policies and procedures to control the use of tear gas and that prison officials improperly used tear gas to remove him from his prison cell in July 1982. J.A. 13-19.

1. *Factual Background.* The facts of this "fairly straightforward section 1983 suit"[3] are not challenged, Pet. Br. 10, n.7, and are set forth in full in the district court's findings of fact. J.A. 34-45. They can be summarized as follows:

On July 13, 1982, McCarthy was incarcerated at CCIS and was assigned to cell F-36, the last cell at the end of death row. Referred to as the "death cell" and separated from the other cells in the segregation unit by a wall with a door, it was used to isolate the most difficult prisoners if they posed a threat or caused a disruption. At approximately 9:00 A.M. on July 13, 1982, Lt. Steven Tozier, the director of the Special Offenders Program, which included the segregation unit, notified McCarthy that he would be moving that day to another cell in administrative segregation. J.A. 34.

At that time, there were administrative directives in effect authorizing the use of force and chemical weapons against inmates in prescribed circumstances. J.A. 42-45. Then, as now, under these directives, prior to the use of any force, correctional officers must wait for a supervisor to arrive on the scene and must first use all reasonable verbal means to ask an inmate to come out of his cell voluntarily. J.A. 36-37. CCIS policy further provides that when deciding whether to use tear gas, a supervisor must consider a number of factors, including: (i) the potentially assaultive and aggressive nature of the inmate, (ii) whether the inmate is refusing to come out of his cell, and (iii) whether the inmate is threatening the officers with physical harm. J.A. 42. Tear gas may be used when correction officers have to remove an inmate from an area which the inmate controls or when there are barriers which would prevent the officers from using mace and would place the officers at risk upon entering the cell. J.A. 42-43. All of the prerequisites for the use of tear gas were met in this case.

When Lt. Tozier arrived, he was informed that McCarthy had refused to come out of his cell, had tied the cell door shut, jammed his lock, and was in an angry, agitated state. The officers met with Lt. Tozier and discussed a "game plan" for getting McCarthy to leave his cell. It was decided that the officers would first ask McCarthy to come out of his cell voluntarily and then issue an order if necessary. If refused, the officers would enter the cell and remove McCarthy. J.A. 36-37. The officers asked McCarthy to come out peacefully and spent approximately ten to fifteen minutes trying to coax him out of his cell. J.A. 37. McCarthy refused to leave the cell and stood holding the mattress from the bed and threatening the officers. McCarthy told the officers "You will have to come in and get me," and, "Someone is going to get hurt." J.A. 36-37.

As director of the Special Offender Program, Lt. Tozier had reviewed McCarthy's misconduct record and was aware that he had received approximately fifteen misconduct reports, including reports for possession of drugs and intoxicating substances and possession of a weapon. J.A. 44. Lt. Tozier was a shift supervisor and was authorized by CCIS policy to order the use of tear gas. J.A. 34-35. On Lt. Tozier's order, Officer Paul Lusa operated the tear gas duster on that

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[2] The petitioner, John J. McCarthy, (hereinafter "McCarthy" or "petitioner"), is a Connecticut state prisoner, presently incarcerated in the United States Penitentiary, Leavenworth, Kansas, subject to return to Connecticut correctional facilities at any time in the discretion of state or federal prison officials.

[3] J.A. 67; 906 F.2d at 840.

day. He approached McCarthy's cell door and placed the tear gas duster on the cell bars. Officer Lusa was the hallkeeper and had on many occasions responded to various prison emergencies including situations that involved moving inmates. He had substantial experience with the tear gas duster and had used it on numerous occasions prior to July 13, 1982. J.A. 37.

When McCarthy saw the duster, he used the mattress to shield himself and did not leave. Suddenly, McCarthy lunged toward a specific area of his cell. Believing that McCarthy was lunging for a weapon, Officer Lusa deployed the tear gas duster, at the command of the supervisor, and sprayed it for about three seconds. J.A. 37, 45. This gave the officers enough time to gain control of McCarthy safely, without having to use bodily force or engage in a physical struggle. J.A. 38. A ten-inch shank or homemade knife was subsequently found among McCarthy's personal property in his cell. J.A. 39-40. Use of the tear gas duster avoided injury to both the officers and McCarthy, and under the circumstances, was authorized pursuant to CCIS policy. J.A. 45.

2. *Proceedings in the District Court.* On April 11, 1983, McCarthy brought suit pursuant to 42 U.S.C. § 1983, seeking money damages and injunctive relief "to correct useage" [sic] of tear gas in the prison. J.A. 3-6. McCarthy alleged that the use of tear gas against him on July 13, 1982, constituted excessive force and that there were unconstitutional deficiencies in prison policies relating to the use of tear gas in general. J.A. 11-24. McCarthy sought damages and an order enjoining the use of tear gas and requiring the defendants to "formulate and adopt rigid Directives restricting the use of Tear Gas . . ." J.A. 23; *see also* J.A. 6, 9, 11-24. His complaint did not request a jury trial.[4]

[4] He amended his complaint twice. The second amended complaint, filed over two years after the initial complaint, requested a jury trial for the first time. J.A. 11-24. The magistrate, however, denied petitioner leave to file a jury demand, because he had already consented to a court trial under 28 U.S.C. § 636(c). J.A. 28-29, 61, 67-69; R. certified docket sheet filing #28 (D. Conn. June 10, 1985).

On February 28, 1985, McCarthy signed a consent form agreeing to have the case tried before a magistrate pursuant to 28 U.S.C. § 636(c). J.A. 7. However, on March 24, 1988, the first day of the trial before the magistrate, McCarthy refused to sign a second consent form, stating that he preferred to have the case heard by the district judge. Although not required to do so, the magistrate permitted McCarthy to withdraw his consent, and over his objection, proceeded to hear the case as "recommended fact-finder," with the district judge to make the final determination after de novo review. J.A. 30-32. The district judge, after considering McCarthy's objections and pending motions, approved the magistrate's findings and recommendations, and entered judgment for the defendants. J.A. 52-58.

3. *Proceedings In The Court Of Appeals.* In his appeal, McCarthy challenged, *inter alia*, "procedural irregularities concerning the reference to the Magistrate." J.A. 59, 906 F.2d at 837. The Court of Appeals concluded that the magistrate had properly "used the authority of subsection 636(b)(1)(B) to conduct a hearing and recommend proposed findings of fact concerning 'prisoner petitions challenging conditions of confinement.'" J.A. 64, 906 F.2d at 839. The Court held:

> With complete propriety, [the Magistrate] could have declined to vacate the 636(c) consent and adjudicated the merits definitively. He was surely entitled to take the lesser step of hearing the evidence and submitting recommended findings to the District Judge. The parties' consent is not required for using that procedure, and it is obvious, from the District Judge's subsequent approval of the Magistrate's findings, that the Judge welcomed the Magistrate's help.

J.A. 64; 906 F.2d at 839.

The Court affirmed the District Court's decision that the McCarthy lawsuit was a petition "challenging conditions of confinement" within the meaning of § 636(b)(1)(B), even

though it involved a specific episode of alleged misconduct. J.A. 65; 906 F.2d at 839.

> We see no reason why a Magistrate with clear authority to hold hearings and recommend findings as to the unconstitutionality of continuing prison conditions may not perform a similar function as to specific episodes of unconstitutional conduct by prison officials.

Id. McCarthy's petition for a rehearing was denied on August 6, 1990. J.A. 71.

On August 21, 1990, the petitioner filed his *pro se* petition for a writ of certiorari. On December 10, 1990, this Court granted his motion to proceed *in forma pauperis* and granted the petition for a writ of certiorari. J.A. 72.

SUMMARY OF ARGUMENT

The issue before the Court in this case is whether a specific episode of allegedly unconstitutional conduct is a "condition of confinement" within the meaning of 28 U.S.C. § 636(b)(1)(B). The Court of Appeals below correctly concluded that the phrase "conditions of confinement" includes specific episodes, and its decision should be affirmed. *See* J.A. 63-66; 906 F.2d at 838-39.

The essence of petitioner's argument is that, to be consistent with the Seventh Amendment, Congress must have intended to limit the term "conditions of confinement" to cases alleging ongoing, pervasive practices and seeking injunctive relief only, so that the right to a trial by jury would never be implicated. This interpretation contravenes both the language and legislative history of the statute and goes well beyond what is necessary to avoid constitutional conflict.

1. The limitations that the petitioner asks this Court to place on the term "conditions of confinement" are found nowhere in 28 U.S.C. § 636(b)(1)(B) and do not flow logically from the language or structure of the statute. The Court of Appeals reasonably and properly concluded that "[t]he phrase 'conditions of confinement' appears not to have been selected as a limitation to preclude episodes of misconduct, but rather as a generalized category covering all grievances occurring during prison confinement." J.A. 65-66; 906 F.2d 839 (citing *Preiser v. Rodriguez*, 411 U.S. 475 (1973) and legislative history of § 636(b)). This approach makes common sense, provides clarity and predictability to district judges, and avoids rewriting the statutory language chosen by Congress.

2. The interpretation of the court below is amply supported by the legislative history as well as the text of the Federal Magistrates Act. In enacting the 1976 amendments to the Federal Magistrates Act of 1968,[5] Congress autho-

[5] Act of Oct. 21, 1976, Pub. L. 94-577, 90 Stat. 2729 (codified as amended at 28 U.S.C. § 636(b)). *See* Appendix, *infra*.

rized magistrates to conduct evidentiary hearings with respect to two broad categories of prisoner claims, "applications for posttrial relief" and "prisoner petitions challenging conditions of confinement." Congress used expansive terms in attempting to describe the universe of prisoner claims that a district judge may refer under § 636(b)(1)(B) to a magistrate for "proposed findings and recommendations." Congress clearly intended to broaden the use of magistrates and ease the burden on judges. *See United States v. Raddatz*, 447 U.S. 667, 676 n.3 (1980). Affirming the decision below will advance Congress's goal of reducing the backlog of prisoner cases clogging the district courts and providing district judges with discretion to use magistrates to increase judicial efficiency and effectiveness. *See* S. Rep. No. 625, 94th Cong., 2d Sess. 2 (1976); H.R. Rep. No. 1609, 94th Cong., 2d Sess. 4 (1976).

3. There is no need for this Court to rewrite the Federal Magistrates Act to avoid a conflict with the Seventh Amendment. In this case, petitioner indisputably waived his right to a jury trial and the reference to a magistrate therefore did not infringe the Seventh Amendment. Had petitioner properly asserted and preserved his right to a jury trial, the magistrate could not have proceeded under § 636(b)(1)(B). Petitioner, however, seeks to exempt from the statute every prison claim involving a specific episode of misconduct, including cases in which there is no jury trial right because the prisoner seeks only equitable relief, has chosen not to seek a jury trial, or has waived his right to a jury trial. Under this construction of the statute, a prisoner without a jury trial right could nonetheless block the referral of his case to a magistrate, frustrating Congress's intent to give broad authority to magistrates to hear prisoner petitions. It would remove from the magistrate's purview a much larger category of cases than is necessary to avoid Seventh Amendment problems.

4. The balance of authority holds only that § 636(b)(1)(B) does not authorize a magistrate to try a case in which a jury

trial has been properly claimed, not that § 636(b)(1)(B) must be construed to preclude all single episode prisoner claims. *See, e.g., Hall v. Sharpe*, 812 F.2d 644 (11th Cir. 1987); *Archie v. Christian*, 808 F.2d 1132 (5th Cir. 1987) (en banc). Even in *Hill v. Jenkins*, 603 F.2d 126 (7th Cir. 1979), in which Judge Swygert's concurrence offered the definition of "conditions of confinement" that petitioner now advances, the majority did not accept that definition, but held instead that the magistrate could not conduct a nonconsensual civil trial under § 636(b). In the case most analogous to this one, *Branch v. Martin*, 886 F.2d 1043 (8th Cir. 1989), the court referred a prisoner petition alleging a specific episode of excessive force to a magistrate under § 636(b)(1)(B). Other courts have also referred specific episode cases without commenting on the "conditions of confinement" issue. *See* p. 23, n.24, *infra*.

5. Petitioner's construction of § 636(b)(1)(B) would create an unworkable statutory scheme and unnecessarily burden district judges. Whether a claim involves "ongoing" or "continuing" practices, as opposed to a "specific episode," will often be unclear—especially where, as in this case, a prisoner petition is based on a specific episode but the action in question was taken pursuant to a continuing prison policy that is challenged. If, as petitioner suggests, the reference to a magistrate under § 636(b) raises a jurisdictional question, *see Clark v. Poulton*, 914 F.2d 1426 (10th Cir. 1990) (amended petition for rehearing with suggestion for rehearing en banc filed, Nov. 6, 1990), judges would need to conduct a preliminary inquiry merely to determine which judicial officer, judge or magistrate, has jurisdiction to hear the case. Adopting petitioner's interpretation would clearly increase the caseload of federal district judges, who could not refer to a magistrate any prisoner case found to challenge a specific episode of misconduct. In addition, under petitioner's approach, magistrates would handle primarily class actions and sweeping challenges to prison conditions, (*see* Pet. Br. 26-27), while federal judges would have to hear every individual case in which a prisoner complains about his treatment. These results would make make no sense and

would be contrary to the intent of Congress to give judges broader authority to refer prison cases to magistrates to help relieve their ever-increasing caseload.

ARGUMENT

I. PETITIONER'S CONSTRUCTION OF 28 U.S.C. § 636(b)(1)(B) TO EXCLUDE ALL PRISONER PETITIONS ALLEGING SPECIFIC EPISODES OF MISCONDUCT CONTRAVENES BOTH THE LANGUAGE AND LEGISLATIVE HISTORY OF THE STATUTE.

A. The Language Of § 636(b)(1)(B) Allows Reference Of All "Prisoner Petitions Challenging Conditions Of Confinement" And Plainly Does Not Exclude Challenges To Specific Episodes Or Practices.

In deciding an issue of statutory construction, the Court "must begin with the language of the statute itself." *Bread Political Action Committee v. Federal Election Commission*, 455 U.S. 577, 580 (1982) (quoting *Dawson Chemical Co. v. Rohm & Haas Co.*, 448 U.S. 176, 187 (1980)).

Title 28 U.S.C. § 636(b)(1)(B) authorizes a district judge to refer to a magistrate for evidentiary hearings, proposed findings, and recommendations "prisoner petitions challenging conditions of confinement." Under the guise of giving this broad statutory language its "ordinary" meaning, Pet. Br. 14 (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)), petitioner asks this Court to rewrite the words "conditions of confinement" to read:

> complaints concerning ongoing practices or circumstances (often embodied in a regulation) that affect prisoners, or a class of prisoners, generally and, if proven, are subject to redress by appropriate injunctive relief.

Pet. Br. 13-14.

This series of limitations proposed by petitioner can be found nowhere in the statute itself.[6] Congress placed no modifiers before the words "conditions of confinement." Petitioner asks this Court to insert the word "continuing," for example, into the phrase "conditions of confinement," but Congress plainly did not limit § 636(b)(1)(B) referrals to "prisoner petitions challenging *continuing* conditions of confinement." *See Maine v. Thiboutot*, 448 U.S. 1, 4 (1980) (interpreting broadly the phrase "and laws," as used in 42 U.S.C. § 1983, because Congress attached no modifiers).

Nor did Congress limit referrals under § 636(b)(1)(B) to "*purely injunctive actions* broadly challenging ongoing, pervasive conditions of confinement." Pet. Br. 19 (emphasis added). Petitioner again seeks to read into the statute language which is plainly absent. Congress placed no limitation on the magistrate's authority based on a particular remedy which may or may not be available in a particular case.[7] Many prisoner petitions are actions under 42 U.S.C. § 1983, for example, which itself expressly provides for

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[6] Petitioner's resort to the dictionary definition of "condition" does not support his position. *See Webster's Third New International Dictionary* 473 (1968) (wide variety of definitions for "condition"); *see also Random House Dictionary of the English Language* 425 (2d ed., unabridged 1987) (14 definitions for "condition" as a noun; 25 definitions overall). Even the definition selected by petitioner — an "existing state of affairs" or "mode or state of being," Pet. Br. 14 n.8 — does not lead to the conclusion that a condition of confinement must mean an ongoing or pervasive practice affecting more than one person. *See Branch v. Martin*, 886 F.2d 1043, 1045 n.1 (8th Cir. 1989) ("The term 'conditions of confinement' has been interpreted expansively to include almost any prisoner § 1983 action").

[7] Petitioner suggests that the word "petition" in § 636(b)(1)(B) indicates an equity proceeding. Pet. Br. 22, n.16. But the ordinary definition of "petition" is much broader. *See Black's Law Dictionary* 1031 (5th ed. 1979) (defining "petition" broadly, as "[a] formal written application to a court requesting judicial action on a certain matter"); *Webster's Third New International Dictionary* 1690 (1981) (petition as a "formal written request addressed to a magistrate or court praying for preliminary, incidental, or final specific relief and setting forth the facts or reasons therefor; or a complaint; or a formal statement of a cause of action addressed to a court or magistrate").

liability in both an "action at law" and a "suit in equity." Congress simply did not limit the magistrate's authority to hear "prisoner petitions challenging conditions of confinement" to those which seek injunctive relief only.[8]

Had Congress intended to restrict the scope of cases which could be referred to magistrates, it could have done so explicitly, as it has done in other statutes. For example, in the RICO Act, 18 U.S.C. § 1961 *et seq.*, Congress made unlawful various practices arising from "*a pattern* of racketeering activity," 18 U.S.C. § 1962(a) (emphasis added), and was careful to define "pattern of racketeering activity" to require "at least two acts of racketeering activity." 18 U.S.C. § 1961(5).[9] If Congress had intended to limit "conditions of confinement" to continuing or widespread practices, presumably it would have said so expressly. *Gomez v. United States*, 109 S. Ct. 2237, 2247 (1989).[10]

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[8] By contrast, in § 636(b)(1)(A) Congress expressly limited the authority of magistrates based on the nature of the relief sought. Section 636(b)(1)(A) specifically exempts eight categories of dispositive motions, including "a motion for injunctive relief," which the magistrate cannot "hear and determine" under that section. *See Russello v. United States*, 464 U.S. 16, 23 (1983).

[9] Petitioner relies on the use of the phrase "conditions of confinement" in other statutory provisions, 42 U.S.C. §§ 1997a and 1997c, to support his interpretation of that phrase here. Pet. Br. 17. But in that statute, Congress repeatedly used the phrase "*pattern or practice*" to define the limits of the Attorney General's authority to initiate or intervene in civil actions against state officials for "*equitable relief.*" (emphasis added). These express limitations on both the type of conduct and the nature of relief under 42 U.S.C. §§ 1997a-c are plainly absent from § 636(b)(1)(B).

[10] Petitioner also relies on the use of the phrase "conditions of confinement" in other federal statutes to support his interpretation. Pet. Br. 17. But it is clear from those statutes that Congress was referring to *physical* prison conditions. *See* 42 U.S.C. § 3769 (a statute providing fiscal assistance for innovative fast-track construction of state correction facilities, which specifically refers to relieving overcrowding and substandard conditions) (42 U.S.C. § 3769a(a)(1)); 18 U.S.C. § 4013(a)(4) (authorizing Attorney General to make payments to states "for the necessary construction, physical renovation . . . required to establish acceptable conditions of confinement"). Obviously, these statutes and the Magistrates Act have very different purposes and the phrase "conditions of confinement" need not be construed to mean the same thing in § 636(b)(1)(B).

The respondents' interpretation of "conditions of confinement" to include prisoner complaints arising from specific episodes of conduct as well as ongoing, systemic conditions is further supported by a reading of the statute in its entirety. *Gomez*, 109 S. Ct. at 2241 ("in expounding on a statute, we [are] not . . . guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy") (additional citations omitted).

The Court of Appeals below compared the phrase "petitions challenging conditions of confinement" in § 636(b)(1)(B) with the phrase which immediately precedes it, "applications for posttrial relief made by individuals convicted of criminal offenses." J.A. 66; 906 F.2d at 839. The court reasoned that both of these phrases used by Congress were "broad categories of prisoner claims." *Id.* The phrase "applications for posttrial relief" is clearly expansive and includes proceedings other than habeas actions, such as motions to vacate sentences. Similarly, Congress chose the phrase "prisoner petitions challenging conditions of confinement," to denote all causes of action brought by prisoners relating to or arising from prison conditions, other than those seeking postconviction relief.

Relying on this Court's decision in *Preiser v. Rodriguez*, 411 U.S. 475 (1973), the Court of Appeals correctly concluded that "[t]he phrase 'conditions of confinement' appears not to have been selected as a limitation to preclude episodes of misconduct, but rather as a generalized category covering all grievances occurring during prison confinement." J.A. 65-66; 906 F.2d at 839. *See Preiser*, 411 U.S. at 498-500 (distinguishing § 1983 prisoner civil rights actions concerning "conditions of confinement" generally from habeas actions concerning length or fact of confinement); *see also Ford v. Estelle*, 740 F.2d 374, 379 n.2 (5th Cir. 1984) (citing *Preiser* and noting that this understanding of "conditions of confinement" was "fairly current in 1976").

B. The Legislative History Of The Magistrates Act Strongly Supports A Broad Reading Of § 636(b)(1)(B).

Congress enacted the Federal Magistrates Act in 1968[11] in order to create a system of judicial officers who would assist the district judges "in handling an ever-increasing caseload." S. Rep. No. 625, 94th Cong., 2d Sess. 2 (1976) ("1976 Senate Report");[12] *See Wingo v. Wedding*, 418 U.S. 461, 462-63, 474-76 (1974). The 1968 Act authorized "additional duties" for federal magistrates, including "preliminary review of applications for posttrial relief," but did not authorize them to conduct evidentiary hearings. *Id.* at 470-472.

It was this Court's decision in *Wingo v. Wedding*, holding that magistrates could not hear and determine habeas matters under § 636(b)(3) of the 1968 Magistrates Act, 418 U.S. at 469-70, that spurred Congress to amend the Act in 1976. The amendments reformulated the "additional duties" section of the Act and added the language of § 636(b)(1)(B) that is in the statute today. 1976 Senate Report at 3; 1976 House Report at 5.

Congress, however, not only expressly authorized magistrates to conduct evidentiary hearings in habeas matters, it

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[11] Pub. L. No. 90-578, § 101, 82 Stat. 1113 (1968) (codified as amended at 28 U.S.C. § 636 (1976)). *See generally* K. Sinclair, *Practice Before Federal Magistrates*, §§ 3.03, 3.04 (1990).

[12] The House Report is in accord. *See* H.R. Rep. No. 1609, 94th Cong., 2d Sess. 4, *reprinted in* 1976 U.S. Code Cong. & Admin. News 6162-6173 ("1976 House Report"). Commentators agree that the purpose of the Act was to broaden the authority of the magistrates and provide judges with flexibility and discretion. *See, e.g.*, Spaniol, Jr., *The Federal Magistrates Act: History and Development*, 1974 Ariz. St. L.J. 565; McCabe, *The Federal Magistrate Act of 1979*, 16 Harv. J. Legis. 343 (1979).

Seventeen days of hearings were held in the 93rd Congress, at which the chief judges of forty-four federal judicial districts testified about the value and importance of magistrates' assistance, particularly in handling prisoner habeas corpus petitions. *See* 1976 Senate Report at 3; 1976 House Report at 4-5.

further expanded the magistrates' authority to include a new category of "prisoner petition" cases. 1976 Senate Report at 9; 1976 House Report at 11. A stated purpose of the 1976 amendments was to authorize magistrates "to hear and recommend a disposition of certain dispositive motions, including habeas corpus proceedings and certain prisoner petitions." 1976 Senate Report at 2.[13] This was consistent with the intent of Congress to broaden the authority of magistrates to assist judges in handling an ever-increasing volume of cases. *See United States v. Raddatz*, 447 U.S. 667, 676 n.3 (1980) (noting, in construing § 636(b)(1), that "the plain objective of Congress [was] to alleviate the increasing congestion of litigation in the district courts"); *Wimmer v. Cook*, 774 F.2d 68, 71 (4th Cir. 1985) ("Each step in this growth in the jurisdiction of the magistrate was prompted by an expressed Congressional desire to reduce the burden on the federal courts caused by the tremendous increase in the caseload in those courts.") The assignment of cases to the magistrates was left to the discretion of the judges. *See* 1976 Senate Report at 9-11; 1976 House Report at 12.

There is no authority in the legislative history for distinguishing between "specific episodes" and "continuing" or "pervasive" conditions of confinement. To the contrary, the expressed purpose of Congress was to authorize magistrates to provide additional assistance to judges by broadening the categories of prisoner cases which may be referred under § 636(b)(1)(B), and by reaffirming the judges' discretion to refer prisoner petitions to magistrates.

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[13] This latter category was described twice in the reports: as "prisoner petitions brought under Section 1983 of Title 42 U.S. code," 1976 Senate Report at 4; 1976 House Report at 6; and as "petitions under section 1983 of title 42 United States Code by prisoners challenging the conditions of their confinement." 1976 Senate Report at 9; 1976 House Report at 11. The term Congress enacted in § 636(b)(1)(B), "prisoner petitions challenging conditions of confinement," is not expressly limited to actions brought under § 1983, and therefore includes *Bivens* actions brought by federal prisoners.

Petitioner's interpretation of "conditions of confinement" would contravene this congressional intent. As the dissent stated in *Clark v. Poulton*, 914 F.2d 1426, 1435 (10th Cir. 1990) (Anderson, J., dissenting), excluding "specific episodes" from the magistrate's authority under the statute would mean that:

> A suit alleging that a prisoner was beaten once must be heard by an Article III judge, but a claim that the prisoner is beaten daily may be referred to a magistrate. Limiting the magistrate's jurisdiction to the more serious claim makes no sense . . . [and this] interpretation conflicts with the legislative intention to give magistrates broad authority to assist judges. *See* H.R. Rep. No. 1609, 94th Cong., 2d Sess. 6-8, *reprinted in* 1976 U.S. Code Cong. & Admin. News, 6162, 6166-68.

In discussing the desirability of expanding references to magistrates, the 1976 Senate and House Reports rely on statistics compiled by the Administrative Office of the United States Courts ("Administrative Office").[14] The Senate Report notes that magistrates handled 7,455 "prisoner petitions" in 1974, and the House Report notes that they handled 8,231 "prisoner petitions" in 1976. 1976 Senate Report at 5; 1976 House Report at 7. These statistics on "prisoner petitions" are not further subdivided into those arising from specific incidents and those arising from ongoing or pervasive conduct, nor into those seeking damages as opposed to injunctive or declaratory relief. In light of Congress's reliance on these statistical tables containing the general phrase "prisoner petitions," as well as Congress's avowed intent to reduce the burden on judges, it is unlikely that Congress intended to limit "prisoner petitions" under § 636(b)(1)(B) to preclude

[14] This Court has judicially recognized and relied on the statistics and interpretation of the Administrative Office of the United States Courts. *See, e.g., Mathews v. Weber*, 423 U.S. 261, 269, 272 n.7 (1976).

magistrates from hearing any and all "specific episode" cases.[15]

Petitioner contends that allowing only broad-based injunctive relief cases to be referred to magistrates would still help reduce the burden on federal judges, because magistrates could continue to handle certain complex, prison class actions. Petitioner suggests that this may be what Congress had in mind, asserting that Congress was "surely aware" of such class actions when it passed § 636(b)(1)(B) in 1976, Pet. Br. 26, but he fails to cite a single reference in the legislative history to support this assertion.

These class actions clearly were not the primary concern of Congress, and they hardly comprise a "large category" of cases, as petitioner contends. Pet. Br. 27. In the fiscal year ending June 30, 1990, there were only 135 prisoner civil rights class action cases pending nationwide in the district courts. 1990 Annual Report of the Director of the Administrative Office of the United States Courts ("Annual Report"), App. I, Table X-4. To put this number in perspective, there were 25,992 prisoner civil rights petitions in 1990, and 42,630 prisoner petitions in total that year. 1990 Annual Report, Table C-2A. It is unreasonable to assume that Congress was focusing solely on class actions and that it therefore intended to allow magistrates to handle only injunction cases challenging widespread, continuing prison practices.[16]

[15] For this Court to acknowledge that Congress intended to broaden magistrates' authority to hear prisoner petitions, and then to narrowly construe what categories of prisoner petitions they can hear, would be to "impute to Congress a purpose to paralyze with one hand what it sought to promote with the other." *United States v. Raddatz*, 447 U.S. 667, 676 n.3 (1980) (citation omitted).

[16] Moreover, even in a class action, a prisoner can seek damages as well as equitable relief. According to petitioner, a request for damages would preclude reference of the case to a magistrate. Petitioner's suggestion that the equitable claims could be severed and tried by a magistrate first (Pet. Br. 27 n.23) would be a cumbersome procedure and would result in a duplication of effort since, as petitioner concedes, the magistrate's findings could have no collateral estoppel effect in a subsequent damages action tried before a jury. *Id.*

There can be little doubt that Congress's concern about the need for magistrates to assist judges in handling prisoner petitions is more critical today than ever before. The largest increases in numbers of federal question cases over the last 30 years have been petitions filed by state prisoners. *See* 1989 Annual Report at 9. The 25,992 prisoner civil rights petitions filed in 1990 were more than double the number filed in 1980. 1990 Annual Report, App. I, Table C2. Prisoner petitions constituted approximately 20%—and prisoner civil rights cases nearly 12%—of all civil cases commenced in fiscal year 1990. *Id.* Magistrates wrote reports and recommendations and helped judges to dispose of 13,132 prisoner petitions pursuant to 28 U.S.C. § 636(b) in 1990. 1990 Annual Report, App. I, Table M-4A.

C. The Right To A Jury Trial Was Not Infringed In This Case, And Petitioner's Strained Construction Of § 636(b)(1)(B) Is Not Needed To Avoid Constitutional Conflict.

Petitioner's Seventh Amendment rights were in no way infringed, and are not now implicated in this case, because petitioner indisputably waived his right to a jury trial. *See* nn. 1, 4 *supra;* Pet. Br. 10 n.7. Petitioner nonetheless uses the Seventh Amendment as a basis for advocating a wholesale reconstruction of § 636(b)(1)(B), which would bar magistrates from hearing cases like this one. In essence, petitioner's argument is that Congress must have intended, without giving any indication of its intent, to exempt from the magistrate's authority a broad category of "specific episode" cases because a jury trial could be claimed in many of these cases.

Respondents agree that courts should not assume that Congress intended to infringe constitutional rights, and

that a statute should be construed so as to avoid constitutional conflict, if possible. *Gomez v. United States*, 109 S.Ct. 2237, 2241 (1989) (it is "settled policy to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question"). *See* Pet. Br. 24, 25. Nor do respondents dispute the contention that a magistrate cannot conduct nonconsensual evidentiary hearings and make recommended findings and conclusions under § 636(b)(1)(B) when a prisoner has a right to have his case tried by a jury and has properly exercised that right under Fed. R. Civ. P. 38.

None of these propositions, however, supports petitioner's claim that magistrates are without authority under § 636(b)(1)(B) to hear any prisoner petition that involves a specific episode of misconduct, even if there is no right to a jury trial in that case. Indeed, petitioner's own case dramatically illustrates that his interpretation of the statute goes well beyond what is necessary to avoid constitutional conflict. Here, petitioner had no right to a jury trial, but insists that a magistrate could not conduct evidentiary hearings without his consent.[17]

Petitioner's case is not unique. Leaving aside the enormous difficulty of determining what constitutes a "specific episode," *see* pp. 24-27 *infra*, there simply will be no claim for a jury trial in many prisoner cases challenging a "specific episode" of misconduct. In some cases, prisoners may not want a jury trial for any number of reasons, one of which

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[17] Arguably, since the right to a jury trial is not an issue in this case, there is no need for the Court to reach this issue and construe the statute in question so as to avoid all possible Seventh Amendment problems that might arise under § 636(b)(1)(B). *See Parker v. Los Angeles*, 338 U.S. 327, 333 (1949) ("The best teaching of this Court's experience admonishes us not to entertain constitutional questions in advance of the strictest necessity.") But the very absence of a jury trial right in this case demonstrates that the broad exception that petitioner would read into § 636(b)(1)(B) is far broader than is necessary to harmonize the statute with the Seventh Amendment and counsels the Court to reject petitioner's interpretation.

may be concern that a jury may be unsympathetic to them or to their claim. In others, prisoners may not properly assert their right to a jury trial under Rule 38, or may choose to waive their right to a jury trial,[18] as happened in this case. In addition, while many "specific episode" cases will involve a claim for damages, and hence be triable by jury, there certainly may be specific episode cases in which prisoners seek equitable relief only.[19] But under the statutory scheme that petitioner imputes to Congress, every "specific episode" case must be tried by an Article III judge if the prisoner objects to a magistrate's involvement under § 636(b)(1)(B), even if he does not have, or has relinquished, the right to a jury trial.

There is no indication that Congress intended § 636(b) to operate in this way. Petitioner cites no reference in the statute's legislative history to the Seventh Amendment or the right to a jury trial,[20] and as discussed above, Congress

[18] As the Court of Appeals noted, "[c]onducting nonjury trials at the prison frequently benefits a prisoner-claimant, since witnesses and documents, needed unexpectedly, are more accessible." J.A. 61; 906 F.2d at 837. A prisoner who waives the right to a jury trial may nonetheless object, for reasons of personality, reputation or the circumstances of his case, to having a magistrate hear his case.

[19] Petitioner focuses almost exclusively on excessive force cases, which often present the most compelling damages claims. *See* Pet. Br. 19 n.13. But a prisoner denied access to a doctor, or a library, for example, may only want the access he has been denied, not damages. *See, e.g., Cooper v. Pate*, 324 F.2d 165 (7th Cir. 1963) (Black Muslim prisoner sought only Koran and certain other religious materials) *rev'd on other grounds*, 378 U.S. 546 (1964) (per curiam). Equitable relief would be available if the prisoner can show that the practice challenged is likely to recur. *See* p. 25 *infra*.

[20] Petitioner points out that the House and Senate Reports cite a case that mentions the right to a jury trial in passing in a footnote (*TPO, Inc. v. McMillen*, 460 F.2d 348, 354 n.37 (7th Cir. 1972)). Pet. Br. 25 n.21. But the Reports refer only to *TPO's* holding that magistrates couldn't decide motions to dismiss under the 1968 Act, in order to make clear that magistrates could hold hearings and recommend disposition of such motions under the new § 636(b)(1)(B). *See* 1976 Senate Report at 9; 1976 House Report at 11 ("This bill will overcome the effect of the decision in *T.P.O. v. McMillen, supra*, relating to motions to dismiss or motions for summary judgment").

intended to give broad authority to magistrates to hear prisoner cases in order to relieve the burden on federal judges. *See pp. 14-18 supra.*

Petitioner argues that the language and structure of § 636(b) suggest that Congress did not intend to authorize magistrates to conduct jury trials under § 636(b)(1)(B). Pet. Br. 20. Respondents agree. But this proposition hardly suggests that Congress meant to exclude from that section a whole category of cases involving no more than the possibility of a jury trial. In fact, Congress created a statutory structure which, in any given case, allows a prison petitioner who seeks money damages and who has a right to a jury trial to preserve that right by properly asserting it. A prisoner who does not have a jury trial right, or who has waived it, may, without his consent, have his case referred to a magistrate, but only for evidentiary hearings and proposed findings under § 636(b)(1)(B). Petitioner claims it would be "highly anomalous to assume Congress intended to authorize nonconsensual referral of single damage cases such as petitioner's." Pet. Br. 24. On the contrary, it would be anomalous to assume that Congress intended to preclude reference to a magistrate of a case in which a prisoner has no right to a jury trial.[21]

Petitioner's restructuring of § 636(b)(1)(B) to preclude a broad category of "specific episode" cases from being referred to a magistrate is unnecessary to preserve prisoners' Seventh Amendment rights, has no support in the legislative history, and undermines Congress's general purpose of broadening magistrate's authority to assist judges with prisoner cases. *See Commissioner v. Engle*, 464 U.S. 206, 217 (1984) (Court's duty "is 'to find that interpretation which can most fairly be said to be imbedded in the statute . . . [and] most

[21] The effect of petitioner's argument is to add a consent requirement to § 636(b)(1)(B) references, even though the term "consent" does not appear in this section, as it does in § 636(c). Had Congress intended to require consent before nonjury damages actions could be referred to magistrates, it presumably would have said so explicitly, as it did in § 636(c). *Russello v. United States*, 464 U.S. 16, 23 (1983).

harmonious with ... the general purposes that Congress manifested'") (additional citations omitted).

D. The Balance Of Authority Does Not Support Petitioner's Narrow Construction of § 636(b)(1)(B).

The Courts of Appeals which have construed § 636(b)(1)(B) to exclude "specific episodes" have based their conclusion on a definition of "conditions of confinement" contained, not in the statute, but in a concurrence by Judge Swygert in *Hill v. Jenkins*, 603 F.2d 1256, 1260 (7th Cir. 1979). Judge Swygert's definition was supported by no authority. It was nonetheless followed by the Ninth Circuit, *Houghton v. Osborne*, 834 F.2d 745 (9th Cir. 1987)[22] and the Tenth Circuit in *Clark v. Poulton*, 914 F.2d 1426 (10th Cir. 1990), over strong dissent. *See Poulton*, 914 F.2d at 1434 n.1 (Anderson, J., dissenting) ("Judge Swygert's concurrence cites no authority for his narrow construction of the statute, and the cases adopting his construction cite no authority other than the concurrence and the other cases adopting it."). *See also Houghton*, 834 F.2d at 751 (Goodwin, J., dissenting). Notably, the majority in *Hill v. Jenkins* did not accept Judge Swygert's definition, instead ruling, *inter alia*, that the magistrate could not conduct a nonconsensual civil trial under § 636(b). 603 F.2d at 1258.[23]

Most of the other cases cited by petitioner similarly stand solely for the proposition that magistrates cannot conduct trials in jury cases under § 636(b)(1)(B). For example, in *Hall v. Sharpe*, 812 F.2d 644 (11th Cir. 1987); *Archie v. Christian*, 808 F.2d 1132 (5th Cir. 1987) (en banc) and *Wimmer v. Cook*, 774 F.2d 68 (4th Cir. 1985), the courts all held that a magistrate could not conduct a nonconsensual jury trial under § 636(b)(1)(B) when a jury trial had been demanded. None of these decisions interprets § 636(b)(1)(B) as precluding reference to a magistrate of an entire category of "specific episode" cases. Other courts have referred what appear to be "specific episode" cases to magistrates without commenting on the "condition of confinement" issue.[24]

The case of *Branch v. Martin*, 886 F.2d 1043, (8th Cir. 1989), is most analogous to this case. In *Branch*, a prisoner claimed that prison guards had used excessive force against him on one occasion, but he made no request for a jury trial. *Id.* at 1044. Noting that the term "conditions of confinement" had been interpreted "expansively," *id.* at 1045 n.1, the court did not question the reference to a magistrate under § 636(b)(1)(B).[25] *See McCarthy*, J.A. 65, 906 F.2d at 839 (citing *Branch*).

None of this Court's decisions relied upon by petitioner, Pet. Br. 15, interprets the "conditions of confinement" language in the Magistrates Act, and none supports his position that the words "conditions of confinement" must be limited to ongoing and pervasive practices which lead to actions for injunctive relief only. *Whitley v. Albers*, 475 U.S. 312 (1986), on which petitioner places "particular significance," Pet. Br. 16, does not treat "conditions of

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[22] In *Houghton*, a prisoner challenged the requirement that he wear prison clothing at court proceedings. Arguably, *Houghton* is distinguishable from this case because the claimant was in a mental health facility and thus was "no longer subject to [the] jail clothing rules" and "not seeking damages for an ongoing jail or prison practice." 834 F.2d at 749.

[23] An additional problem in *Hill* was that a jury trial had been demanded. 603 F.2d at 1257.

[24] The Third, Fourth and Sixth Circuits have permitted references to magistrates of prisoner petitions that appear to have alleged "specific episodes" without commenting on the "conditions of confinement" issue. *Goney v. Clark*, 749 F.2d 5 (3d Cir. 1984) (unlawful transfer to solitary confinement); *King v. Blankenship*, 636 F.2d 70 (4th Cir. 1980) (claim of excessive force on two occasions); *Roland v. Johnson*, 856 F.2d 764 (6th Cir. 1988) (specific episode of alleged inmate-inmate rape).

[25] The court in *Branch* remanded, however, on the ground that the district judge did not conduct the de novo review required by § 636(b)(1)(B). 886 F.2d at 1045.

confinement" as a unique Eighth Amendment claim,[26] let alone suggest that the substantive standards for an Eighth Amendment case should govern the interpretation of what types of prisoner petitions can be referred to a magistrate under the Act.[27]

II. PETITIONER'S DISTINCTION BETWEEN "SPECIFIC EPISODES" AND CONTINUING CONDITIONS IS UNWORKABLE, WOULD BURDEN DISTRICT COURT JUDGES, AND WOULD LEAD TO UNREASONABLE RESULTS.

Petitioner asserts that the distinction between prisoner petitions alleging a specific episode of unconstitutional conduct and those alleging ongoing unconstitutional practices is "easily drawn." Pet. Br. 18. The opposite is true. The delineation is often blurred, with allegations stemming from a single incident frequently interspersed with allegations of unconstitutional deficiencies in prison policies. In addition, prisoners typically seek both damages and injunctive or declaratory relief in such cases, as petitioner did here.[28]

[26] In *Whitley*, the Court took into account the special circumstances involved in using force to quell a prison riot, but articulated a general standard to apply to prison Eighth Amendment cases:

> It is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause, whether that conduct occurs in connection with establishing conditions of confinement, supplying medical needs, or restoring official control over a tumultuous cellblock.

Whitley, 475 U.S. at 319.

[27] This Court's decision in *Preiser v. Rodriguez*, 411 U.S. 475, 498-500 (1973), which distinguishes habeas actions challenging the fact or duration of confinement from § 1983 actions challenging conditions of confinement generally is more apposite than *Whitley*. *See also Ford v. Estelle*, 740 F.2d 374, 379 n.2 (5th Cir. 1984).

[28] *E.g.*, *Wimmer v. Cook*, 774 F.2d 68, 69 (4th Cir. 1985); *Orpiano v. Johnson*, 687 F.2d 44, 45 (4th Cir. 1982).

Even this case, which petitioner casts as "a single episode of unconstitutional conduct directed exclusively at him," Pet. Br. 10, could better be described as a challenge to an ongoing condition of confinement. McCarthy alleged that the use of tear gas in a single incident constituted excessive force, but he also alleged unconstitutional deficiencies in ongoing prison policies relating to the use of tear gas in general. J.A. 11-24. Those policies, which were carefully followed by prison officials and which allowed the use of tear gas in this case, *see pp.* 2-4 *supra*, continued in effect. There is little question that, if similar circumstances occurred again, tear gas would have been used against McCarthy or other prisoners pursuant to those continuing policies. Petitioner specifically sought injunctive relief requiring a more restrictive tear gas policy, and had he succeeded on the merits of his Eighth Amendment claim, he might well have been entitled to such relief.[29] Arguably, then, this case even falls within Judge Swygert's definition of challenges to "ongoing prison practices and regulations with regard to matters such as . . . cruel and unusual punishment by prison authorities." *Hill*, 603 F.2d at 1260.

In any event, it is clear that if the reference to a magistrate under § 636(b)(1)(B) were dependent on the "single episode" versus "ongoing practices" distinction urged by the petitioner, district judges would frequently be uncertain as to which cases could be referred.[30] This uncertainty would

[29] *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), relied upon by petitioner, does not stand for the proposition that injunctive relief is never available in specific episode cases. It was unavailable in that case because the plaintiff, who was subject to a choke hold when stopped by police for a traffic violation, could not show a real or immediate threat that he would be wronged again in the same way. When a prisoner like McCarthy remains in a prison subject to a continuing prison policy, injunctive relief may be appropriate.

[30] The courts have already reached conflicting conclusions. *Compare Clark v. Poulton*, 914 F.2d at 1430 (two episodes of alleged excessive force not a "condition of confinement") *with Branch v. Martin*, 886 F.2d 1043, 1045 n.1 (8th Cir. 1989) (assault on one occasion is condition of confinement); *and Thompson v. Nix*, 897 F.2d 356, 357 (8th Cir. 1990) (assault on two occasions is condition of confinement).

be compounded by petitioner's additional proposed requirement that, to be a "condition of confinement," an ongoing practice must "generally affect[ ] at least a segment of the prison population as a whole." Pet. Br. 18.

District court judges would have to conduct a preliminary inquiry just to determine whether a prisoner petition could be referred to a magistrate.[31] Not only would this impose an extra burden on judges, but the stakes of such a preliminary determination would be extremely high. The court in *Clark v. Poulton* held, relying on *Gomez v. United States*, 109 S. Ct. 2237 (1989), that it was jurisdictional error to refer to the magistrate "specific episode" claims. Consequently, if a trial court were to conclude erroneously that a "continuing condition" was at issue, this error would be jurisdictional and could be raised for the first time on appeal. If the court of appeals subsequently held that only a "specific episode" was involved and that the magistrate was therefore without jurisdiction, all of his efforts would have been wasted. Such an interpretation makes no sense and would result in a squandering of judicial resources.

Moreover, as the dissent in *Poulton* forcefully pointed out, excluding all "specific episode" cases from § 636(b)(1)(B) would not lead to a sensible division of responsibilities between judges and magistrates:

> According to the majority, a suit alleging that a prisoner was beaten once must be heard by an Article III judge, but a claim that the prisoner is beaten daily may be referred to a magistrate. Limiting the magistrate's jurisdiction to the more serious claim makes no sense, and nothing in the legislative history persuades me that Congress intended such an anomaly. *See Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) ("interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available"); *American Tobacco Co. v. Patterson*, 456 U.S. 63, 71 (1982) ("Statutes should be interpreted to avoid untenable distinctions and unreasonable results whenever possible."). Their interpretation conflicts with the legislative intention to give magistrates broad authority to assist judges. *See* H.R. Rep. No. 1609, 94th Cong., 2d Sess. 6-8, *reprinted in* 1976 U.S. Code Cong. & Admin. News, 6162, 6166-68.

Poulton, 914 F.2d at 1435.

Under petitioner's approach, the types of cases that clearly could be referred to a magistrate pursuant to § 636(b)(1)(B) are class actions and other sweeping challenges to prison conditions and practices seeking injunctive relief. *See* Pet. Br. 26. But it makes no sense to require that federal district judges themselves hear every case in which a prisoner has a complaint about his individual treatment, even where no Seventh Amendment right is involved, and assign to magistrates the biggest and most significant prison cases.[32] Contrary to petitioner's assertion, it is virtually inconceivable that Congress intended this nonsensical division of labor. *See* pp. 14-18 *supra*.

The most reasonable and workable interpretation of the phrase "conditions of confinement" is the one adopted by the Second Circuit to include "all grievances occurring during prison confinement." J.A. 65-66; 906 F.2d at 839. This interpretation is supported by the statutory text and legislative history. It does not undercut the Seventh Amendment

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[31] Frequent amendments, under the liberal test of Fed. R. Civ. P. 15, could complicate this process further.

[32] Many individual cases may be important, but there are notorious examples of prisoners who bring repetitive and often frivolous actions against prison officials challenging various aspects of their treatment. *E.g.*, *Green v. Wyrick*, 428 F. Supp. 732 (W.D. Mo. 1976) (prisoner filed hundreds of lawsuits against prison authorities); *see Cleavinger v. Saxner*, 474 U.S. 193, 203 (1985) (Rehnquist, J., dissenting) (noting prisoners are "prolific litigants" who filed over 18,000 § 1983 and *Bivens* suits in 1984).

rights of prisoners, who can assert and preserve their right to a jury trial, and it best serves Congress's purpose of easing the burden of prisoner cases on federal district judges.

CONCLUSION

The judgment of the Courts of Appeals for the Second Circuit in the case below should be affirmed.

Respectfully submitted,

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No. 90-5635

In The

Supreme Court Of The United States

OCTOBER TERM, 1990

JOHN J. McCARTHY,
Petitioner,

v.

GEORGE BRONSON, WARDEN, ET AL.,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

APPENDIX

APPENDIX

Pertinent Statutory Provisions

28 U.S.C. § 636

(b)(1) Notwithstanding any provision of law to the contrary—

(A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.

(B) a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

(C) the magistrate shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.

Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings of recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions.

(2) A judge may designate a magistrate to serve as a special master pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States district courts. A judge may designate a magistrate to serve as a special master in any civil case, upon consent of the parties, without regard to the provisions of rule 53(b) of the Federal Rules of Civil Procedure for the United States district courts.

(3) A magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States.

(4) Each district court shall establish rules pursuant to which the magistrates shall discharge their duties.

28 U.S.C. § 636

(c) Notwithstanding any provision of law to the contrary—

(1) Upon the consent of the parties, a full-time United States magistrate or a part-time United States magistrate who serves as a full-time judicial officer may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves. Upon the consent of the parties, pursuant to their specific written request, any other part-time magistrate may

exercise such jurisdiction, if such magistrate meets the bar membership requirements set forth in section 631(b)(1) and the chief judge of the district court certifies that a full-time magistrate is not reasonably available in accordance with guidelines established by the judicial council of the circuit. When there is more than one judge of a district court, designation under this paragraph shall be by the concurrence of a majority of all the judges of such district court, and when there is no such concurrence, then by the chief judge.

No. 90-5635

In The

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JOHN J. McCARTHY,

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On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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TABLE OF AUTHORITIES

This case presents a single question: whether, through the operant phrase "prisoner petitions challenging conditions of confinement," Congress intended to authorize the non-consensual referral of prisoner complaints alleging a single unconstitutional episode of excessive force. In our opening brief, we suggested that by far the most natural reading of the statutory language was to limit such references to "complaints concerning ongoing practices or circumstances" – complaints that, by their very nature, are "subject to redress by appropriate injunctive relief." Pet. Br. 13-14. We further demonstrated that, while the legislative history of the prisoner-petitions clause was essentially silent on its meaning, interpreting the language in the manner we suggest conforms with Congress's general objective of lessening the burdens of the district court while being alert to the constitutional limitations on the delegation of judicial authority to magistrates. In particular, since (as respondents now concede) Congress did not empower magistrates to conduct jury trials in cases referred without the parties' consent, it seems highly unlikely that it intended to authorize non-consensual assignment of an entire class of cases for which the prisoner is entitled under the Seventh Amendment to trial by jury.

Respondents' brief does not adequately address any of these issues. Endorsing the minority view in the courts of appeals, they suggest that the prisoner-petitions clause should be read to cover "all grievances occurring during prison confinement" other than "those seeking postconviction relief." Resp. Br. 13 (internal quotations omitted). As the following sections discuss, that interpretation reflects (1) a strained view of the relevant language; (2)

an erroneous reading of the legislative history; (3) a misunderstanding of the relevance of the Seventh Amendment; and (4) an overstated assessment of the practical consequences of the interpretation we advance.

1. Respondents correctly assert that "[i]n deciding an issue of statutory construction, the Court must begin with the language of the statute itself" – and then proceed to ignore that basic directive. Resp. Br. 10 (citations and internal quotations omitted). To be sure, the phrase "conditions of confinement" is not entirely self-defining. Nonetheless, were this case to be decided on the basis of language alone, surely the better interpretation is to read "conditions of confinement" as referring to ongoing practices or circumstances as opposed to an isolated, fully consummated event. More specifically, wherever the outer limits of the definition may be, it stretches the ordinary meaning of the phrase beyond recognition to suggest that a guard, by virtue of using tear gas on one prisoner on one occasion, creates a "condition of confinement."

Because the statutory language itself so clearly tips in favor of the interpretation we suggest, it is respondents, not petitioner, who must bear the burden of demonstrating that Congress did not mean what it said. None of respondents' textual arguments, however, even begin to accomplish that end. Thus, for example, they suggest weakly that standard dictionaries offer numerous definitions for the word "condition." Not surprisingly, however, respondents can provide not a single example of a definition that supports the interpretation they advance. Similarly, respondents concede that a host of statutes – both state and federal – employ the phrase "conditions of

confinement" in a manner inconsistent with the meaning they would prefer. Their only rejoinder is that, read in context, some (but not all) of those statutes make clear that they are addressed primarily to more general concerns, *e.g.*, unconstitutional "conditions" created by a "pattern or practice" of state action. 42 U.S.C. § 1997a.[1] But that too only begs the question. The fact remains that on every occasion in which Congress has used the phrase "conditions of confinement" it was referring to pervasive, ongoing circumstances within a jail or prison as opposed to a single, isolated event.[2]

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[1] Even 42 U.S.C. § 1997a does not support their view. In that provision, Congress authorized the Attorney General to initiate civil suits seeking injunctive relief to remedy certain unlawful "conditions" in state institutions. 42 U.S.C. § 1997a; *see also id.* § 1997c. That Congress authorized the Attorney General to take such extraordinary steps only where the unconstitutional conditions are created or maintained by state actors "pursuant to a pattern or practice of resistance to the full enjoyment of [constitutional or statutory] rights, privileges, or immunities," 42 U.S.C. § 1997a, by no means suggests that Congress used the word "condition" in a way consistent with respondents' view. *See* Resp. Br. 12 n.9.

[2] For the most part, respondents do not even address the numerous decisions of this Court that have (1) used the phrase "conditions of confinement" to describe ongoing, pervasive circumstances or (2) explicitly distinguished such challenges from excessive-force claims. Pet. Br. 15-16. Their only citation in this regard is to *Preiser v. Rodriguez*, 411 U.S. 475 (1973). *Preiser*, however, is of little help to respondents. To begin with, there is no evidence in the legislative history of the Magistrates Act that Congress was even aware of the decision – much less that it patterned the statute after it. More important, *Preiser* in

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Nor does the statutory context of the prisoner-petitions clause suggest a different interpretation. Noting that the language immediately preceding the clause authorizes reference of "applications for posttrial relief made by individuals convicted of criminal offenses," 28 U.S.C. § 636(b)(1)(B), respondents suggest that, in combination, the clauses are intended to sweep in the entire universe of prisoner litigation. But that is simply not the case, as one can readily think of examples of prisoner litigation that fall into neither category – *e.g.*, a claim that the prisoner was injured in the course of his arrest. Even under respondents' broad interpretation, such cases would be excluded.

Finally, respondents contend that it is petitioner who is stretching the plain meaning of § 636(b)(1)(B) by suggesting that the phrase in question refers to "injunctive actions" – language that is "plainly absent" from the statute. Resp. Br. 11. That suggestion, however, misses the

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no way indicates that "conditions" cases include complaints based on isolated incidents. *Preiser* held only that prisoners challenging the fact or duration (as distinct from the conditions) of their confinement could not escape the exhaustion requirement of the federal habeas statutes by filing the claim under 28 U.S.C. § 1983. Because the only question presented was whether a challenge to a reduction in good-time credits was cognizable under § 1983, the Court had no occasion to define the contours of the "conditions" cases alluded to in dictum. Indeed, all of the decisions cited by the Court as examples of such cases involved claims that are consistent with the definition of "conditions of confinement" we advance. *See* 411 U.S. at 498-99.

point. We readily acknowledge that, to the extent references under the prisoner-petitions clause are limited to claims for injunctive relief, it is because of background concerns associated with the Seventh Amendment, not an express congressional directive. Nonetheless, as a window to understanding Congress's intent, the Seventh Amendment is an extremely helpful interpretive device – particularly since it serves only to confirm the more natural reading of the statutory language: Given the clarity of the jury-trial right in specific-episode, damages actions, it is surely the more sensible approach to resolve any ambiguity in the phrase "prisoner petitions challenging conditions of confinement" in a manner that is sensitive to this concern. Understanding the phrase to be a rough proxy for actions that seek, and are appropriate for, injunctive relief – a class of cases that plainly does not include damages actions predicated on a single unconstitutional episode – accomplishes this objective while remaining faithful to the language of the Act. In contrast, the interpretation urged by respondents does neither.[3]

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[3] In this regard, one point in our opening brief requires clarification. We recognize that there will be some complaints in which prisoners seek to enjoin an ongoing, pervasive condition of confinement but which also include an ancillary damages claim – *e.g.*, a class action seeking an injunction to improve the quality of the food, in which some members of the class contend that they are entitled to damages for the health problems suffered as a consequence of their poor nutritional or caloric intake. We suggest that such cases are likely to be exceedingly rare – respondents cite none – if for no other reason than that the damages claim will frequently drop out on qualified immunity grounds. When such cases actually do go

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2. Given that the statutory language, at the very least, tips in favor of petitioner, respondents can prevail only if they can find some evidence in the history or purposes of the provision that suggests a contrary intent. Respondents have done neither.

As noted previously, specific reference to the prisoner-petitions clause in the legislative history is exceedingly sparse and largely unhelpful. Lacking any explicit evidence of congressional intent, respondents place principal reliance on statistics compiled by the Administrative Office of the United States Courts (AO) and reproduced in tabular form in the House and Senate Reports accompanying the 1976 amendments. Resp. Br. 16-18. Pointing out that the statistical table contains an entry entitled "prisoner petitions," and observing that this category is "not further subdivided into those [petitions] arising from specific incidents and those arising from ongoing or pervasive conduct," Resp. Br. 16, respondents contend that Congress therefore intended to

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to trial on both the legal and equitable claims, however, we acknowledge that they are appropriate for reference under the prisoner-petitions clause, subject, of course, to a valid jury-trial demand. For the reasons given in text, the phrase "prisoner petitions challenging conditions of confinement" – in conjunction with the background Seventh Amendment concerns – does suggest that Congress was referring to injunctive actions challenging ongoing practices or circumstances. As the above example makes clear, however, the fit is not entirely perfect. Thus, by force of the statutory language, an otherwise classic "conditions case" is appropriate for referral even if the plaintiff includes an associated damages claim. To the extent our initial brief implied otherwise, *see* Pet. Br. 27 n.23, we were incorrect.

allow reference to magistrates of all prisoner actions relating to confinement.

The inference respondents seek to derive from these statistics is unsupportable. The category of "prisoner petitions" in the AO statistics cited in the legislative reports is entirely undifferentiated, including both prisoner civil rights actions and petitions for habeas corpus. *See* 1976 Annual Report of the Director of the Administrative Office of the United States Courts at 427 (Table M-4) ("1976 Annual Report"). (Indeed, of the 8,231 "prisoner petitions" handled by magistrates in 1976, the vast majority – roughly three out of four – were habeas petitions. *Ibid.*) Accordingly, the major premise of respondents' argument collapses: the phrase "prisoner petitions" in the AO table describes a different category of cases than does the same phrase in the statute itself – which excludes applications for post-conviction relief. The absence of a further breakdown in the AO statistics therefore proves nothing.[4]

In the absence of more concrete evidence of Congress's intent, respondents take refuge in what they view as the general purpose of the 1976 amendments – to "broaden the authority of magistrates to assist judges in handling an ever-increasing volume of cases." Resp. Br. 15. That unquestionable intent, however, is equally consistent with the reading of § 636(b)(1)(B) advanced by petitioner. The difference between respondents' reading

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[4] Nor would it make any sense to subdivide a category of cases that is composed primarily of habeas petitions into "specific episode" and "conditions" subcategories: habeas matters simply cannot be subdivided in that way.

of the prisoner-petitions clause and ours is simply a matter of degree: it is a difference over how far, not whether, Congress intended to broaden the role of magistrates. Moreover, it is an oversimplification to suggest that any interpretation that results in more cases being referred to federal magistrates is necessarily consonant with Congress's purposes. To the contrary, in broadening the authority of magistrates, Congress was also attentive to the constitutional limits on the exercise of that authority. *See* Pet. Br. 25-27. Interpreting the prisoner-petitions clause in the manner we suggest reflects and reconciles these mixed congressional aims; respondents' view exaggerates one aim while completely ignoring the other.

Moreover, our interpretation unquestionably *does* have the effect of relieving district judges of a significant portion of the burden of prisoner litigation – a fact that is easy to lose sight of in the mass of statistics adduced by respondents. We do not contend, for example, that references under the prisoner-petitions clause are limited to class actions. Thus, the statistics respondents offer in that regard are quite beside the point. Even were that the appropriate focus, however, it is well to remember precisely what lies behind these numbers. Because class actions seeking prison reform can span many years, and involve lengthy and complex class-certification, liability, remedy and compliance phases, the savings in judicial resources from referring one such case to a magistrate – everything else being equal – will likely be far greater than the savings resulting from the reference of even several simple damages actions based on isolated events.[5]

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[5] Nor are respondents correct in asserting that prisoner class actions were "clearly" not a cause for congressional

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In any event, even in "specific-episode" cases, magistrates would still be able to spare district judges many (and, typically, all) of the most time-consuming burdens associated with prisoner litigation. The vast majority of prisoner civil rights cases are resolved prior to trial – typically on motions to dismiss or for summary judgment (often on immunity grounds) or upon a finding that the complaint is "frivolous" under 28 U.S.C. § 1915(d). *See* 1990 Annual Report of the Director of the Administrative Office of the United States Courts, App. I, at 49 (Table C5B) (of 24,478 prisoner lawsuits involving civil rights claims terminated in fiscal year 1990, 23,510 – or 96% – were resolved prior to trial); *see also Cleavinger v. Saxner*, 474 U.S. 193, 207-08 (1985) (noting that "the vast majority of prisoner cases are resolved on the complaint alone").[6] Thus, even under our reading, magistrates would dispose of most prisoner litigation (including specific-episode cases) pursuant to their authority under § 636(b)(1)(A)

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concern in 1976. Resp. Br. 17. Indeed, the very same AO Annual Report relied on by Congress for its statistical table and cited by respondents shows that prisoner class actions (including those brought under the habeas statutes) formed a rapidly growing category of cases. Between 1973 and 1976, the number of prisoner class actions pending in the federal courts nearly doubled, rising from 322 to 630. 1976 Annual Report at 213.

[6] Respondents contend that during fiscal year 1990, magistrates "wrote reports and recommendations and helped judges to dispose of 13,132 prisoner petitions pursuant to 28 U.S.C. § 636(b)." Resp. Br. 18 (citing 1990 Annual Report, App. I, Table M-4A). These statistics, however, do not reveal what portion of those dispositions could have been made under the magistrate's "dispositive motions" power under § 636(b)(1)(B).

and the "dispositive motions" portion of § 636(b)(1)(B). Moreover, for those few cases that do survive pre-trial motions practice, even respondents concede that the prisoner can avoid trial before a magistrate by the simple ~~expedient~~ of making a timely jury demand. Resp. Br. 19. For that reason as well, the number of cases that actually will be affected if our position prevails is, as a practical matter, quite small.[7]

In sum, neither the legislative history nor the general purposes of the Act provides any reason for disregarding the clear import of the statutory language. Moreover, as we now explain, respondents have no persuasive answer to our contention that the constitutional backdrop against which § 636(b)(1)(B) was enacted – an important element of any inquiry into legislative purpose – militates strongly against the strained interpretation they propose.

3. Respondents acknowledge that the Seventh Amendment jury-trial right places a significant limitation on the power to make non-consensual referrals pursuant to the prisoner-petitions clause. *See* Resp. Br. 19 ("Nor do respondents dispute the contention that a magistrate cannot conduct nonconsensual evidentiary hearings and make recommended findings and conclusions under § 636(b)(1)(B) when a prisoner has a right to have his case tried by a jury and has properly exercised that right."). They nonetheless resist the more general conclusion – already evident on the face of the statute – that Congress intended to limit such referrals to a class of cases in

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[7] In addition, some cases will be referred consensually pursuant to § 636(c), as this case was initially.

which that right is generally not implicated. None of the arguments they advance in this regard has merit.

To begin with, their suggestion that the "right to a jury trial is not an issue in this case" misses the point. Resp. Br. 19 n.17. As noted previously, "[t]he issue in this case is not whether the statute is unconstitutional as applied, but *how best to interpret Congress's intent*." Pet. Br. 24 n.19 (emphasis added). On that central question, it is surely appropriate to consider the degree to which various interpretations of the language would frustrate a fundamental constitutional right. More particularly, it seems highly unlikely that Congress intended to authorize the non-consensual reference of a class of cases for which the jury-trial right so clearly attaches without making some explicit provision for assuring that the right will be vindicated.

Nor is it at all significant that Seventh Amendment concerns can be avoided by the simple expedient of honoring a prisoner's timely jury demand. In essence, respondents' position is that Congress wrote a statute that, by its express terms, allows courts to refer cases for trial before a magistrate against the prisoner's will – but omitted to include any mention of the fact that the prisoner, usually acting *pro se*, could completely defeat the reference if he only knew enough to request a jury. We doubt very much that Congress intended such a subterfuge. At the very least, it is inappropriate to assume such an intent in the absence of some clear indication in the legislative history.[8]

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[8] Such an intent is particularly unlikely in light of the care Congress took elsewhere in the Act to assure that litigants are

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4. All of respondents' remaining arguments orient around the contention that interpreting the Act in the manner we suggest would be "unworkable" and "would lead to unreasonable results." Resp. Br. 24. As with the suggestion that our interpretation would unduly burden district courts, *see supra* pp. 8-10, respondents' concerns are either unwarranted or overstated.

Respondents' principal contention is that the line between "specific-episode" and true "conditions" cases blurs at the edges and, for that reason, will be difficult and time-consuming to administer. This concern – which rests in part on a misunderstanding of our position – is highly exaggerated. As an initial matter, it is simply wrong to suggest that "[d]istrict court judges would have to conduct a preliminary inquiry just to determine whether a prisoner petition could be referred to a magistrate." Resp. Br. 26. As with any other pre-trial matter, that judgment could be made by the magistrate pursuant to his or her authority under 28 U.S.C. § 636(b)(1)(A) – just as, even under respondents' interpretation, the magistrate would need to identify those prisoner suits that, under any theory, fall outside § 636(b)(1)(B) (*e.g.*, a claim that the prisoner suffered injuries at the time of arrest).

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aware of their rights to avoid reference to a magistrate. Thus, under 28 U.S.C. § 636(c)(2), the clerk of the court gives notice to the parties of "their right to consent" to trial before a magistrate. "Thereafter, neither the district judge nor the magistrate shall attempt to persuade or induce any party to consent to [such] reference." *Ibid.*

Nor is the line itself particularly hard to draw, as evidenced by the numerous decisions in this and other contexts that have preserved the distinction between "specific-episode" cases and those that challenge some aspect of a prisoner's "conditions of confinement." Pet. Br. 14-17 & nn. 9 & 11. At bottom, the interpretive task is no more complicated than distinguishing between a fully consummated event and an ongoing (or recurrent) circumstance or practice.[9] Moreover, while cases in the latter category are, by definition, appropriate for injunctive relief, the distinction does not turn on the nature of the relief actually sought in the complaint. If a prisoner who allegedly was the victim of simple assault inappropriately includes a claim for injunctive relief, the magistrate can readily dismiss the claim pursuant to his or her pre-trial authority under § 636(b)(1)(A). At that point, the case is either over (in the event no other relief was sought) or is readily and unambiguously identifiable as the kind of simple damages action that is not within the purview of the prisoner-petitions clause. Conversely, in those rare cases where prisoners are seeking to enjoin an ongoing or recurrent constitutional violation, but also have a valid damages claim for their associated injuries, the case is properly referable as a "prisoner petition[] challenging

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[9] While the prototypical "conditions" case challenges a practice that affects at least a segment of the prison population as a whole, Pet. Br. 18, a case may still qualify for referral under the prisoner-petitions clause even if the challenged practice is not pervasive or generalized – *e.g.*, a claim by an individual prisoner that he has been provided, and continues to be provided, unconstitutionally inadequate food.

conditions of confinement." *See supra* n.3.[10] As these examples make plain, there is nothing mystifying or particularly difficult about enforcing the distinction we propose.[11]

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[10] Respondents also propose a class of cases in which the complaint is predicated on a specific incident but the petitioner seeks only an injunction. Resp. Br. 20 n.19. In fact, they have found no case that fits that description. (Their citation to *Cooper v. Pate*, 324 F.2d 165 (7th Cir. 1963), *rev'd*, 378 U.S. 546 (1964) (per curiam), *later appeal*, 382 F.2d 518 (7th Cir. 1967), is incorrect, since the prisoner there was challenging ongoing conditions.) In any event, even if there were such a case, the appropriate disposition would be dismissal for failure to state a claim.

[11] Respondents attempt to make much of the fact that petitioner's *pro se* complaint alluded to certain generally applicable prison regulations and included a claim for injunctive relief. Far from showing that the interpretation we propose is untenable, however, the handling of his claim serves only to demonstrate how easy it is to apply. To begin with, the reference to the regulations in the complaint is far from clear. Read in context, most of the references appear to be: (1) part of petitioner's comprehensive account of the underlying events; (2) associated with his apparent view that he had an independent state-law claim for violation of an administrative regulation (J.A. 21); or (3) offered to address the question whether petitioner was tear-gassed "in a good faith effort to maintain or restore discipline" rather than "maliciously or sadistically for the very purpose of causing harm." J.A. 46 (citations and internal quotations omitted). In any event, to the extent he was seeking injunctive relief associated with the regulations, J.A. 23, he was not entitled to it, *City of Los Angeles v. Lyons*, 461 U.S. 95, 111-12 (1983) (Among other things, by the time of trial, petitioner had been transferred to another prison, *see* J.A. 25, thereby mooting any equitable challenge to CCIS's general policies.); and, presumably for that reason, the claim had effectively been eliminated from the case by the time of trial. *See*

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Respondents' final contention is that it makes no sense to allow magistrates to decide cases challenging ongoing prison conditions, while requiring that cases founded on a specific episode of misconduct be resolved by an Article III judge. Since conditions cases are "more serious," they contend, such an allocation is incongruous. Resp. Br. 16, 26-27. For several reasons, the argument is unpersuasive. The most serious flaw, of course, is the assumption that conditions cases are "more serious" than those involving isolated incidents. To the extent that constitutional claims lend themselves to hierarchical ranking at all, it would be surprising to conclude that a claim challenging a policy of "double bunking" was more significant than one alleging that guards killed an inmate with unconstitutionally excessive force. Even accepting the dubious assumption that conditions cases are more "serious," the incongruity respondents allege is overstated. A federal judge may properly refer all pre-trial matters to a magistrate in *any* prisoner lawsuit – referrals that, historically, have resulted in the final disposition of some 96% of all such cases. *See supra* pp. 9-10. And, as respondents themselves readily concede, even in a specific-episode case, the prisoner can guarantee trial before an Article III judge simply by demanding a jury. In short, the incongruity respondents allege finds no basis in fact

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J.A. 25 (making clear in pre-trial ruling that the only issue to be tried was whether "defendants violated [McCarthy's] constitutional rights when they sprayed him with 'Big Red,' a chemical weapon similar to mace"); *see also* J.A. 29.

or reason. Much less is there any evidence that Congress drafted the statute with this concern in mind.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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